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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1122

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

NEWBURG AREA COUNCIL, INC., SARAH WHITE, JOHNIE WRIGHT and SUZANNE POST - - - - - - Respondents

AND

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST GRAYSON, Superintendent - Petitioners

versus

JOHN E. HAYCRAFT and HAZEL K. LANE - - - - - - Respondents

(Other parties respondent on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN A. FULTON
WILL H. FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Jefferson County Board of Education and its Superintendent

Of Counsel:
WOODWARD, HOBSON & FULTON

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

Additional Respondents in Board of Education v. Newburg Area Council, Inc.:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmid, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County, Kentucky and Board of Education of Louisville, Kentucky v. John E. Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmid, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, and Kentucky Human Relations Commission.

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(Other parties respondent on inside cover)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Jefferson County Board of Education and its Superintendent, respectfully pray that a writ of certiorari issue to review the decision rendered in this case on December 11, 1974, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Memorandum Opinion and Judgment of the District Court in Civil Action No. 7291-G, *Haycraft, et al.* v. *Board of Education of Louisville* and *Jefferson County,* entered the 8th day of March, 1973, appears in the separate Appendix, at pages 4-37 and has not been officially reported.

The Memorandum Opinion and Judgment of the District Court in Civil Action 7045, *Newburg Area Council, Inc., et al.* v. *Board of Education of Jefferson County, et al.,* entered the 8th day of March, 1973, appears in the separate Appendix at pages 38-70 and has not been officially reported.

The Opinion of the Sixth Circuit Court of Appeals, decided and filed December 28, 1973, is reported as *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky,* 489 F. 2d 925, and appears at pages 72-83 of the separate Appendix.

The Judgment of the United States Court of Appeals for the Sixth Circuit in Civil Actions Nos. 73-1403, and 73-1408, reflecting the opinion in the above case were entered February 11, 1974, and appears in the separate Appendix on pages 84-87.

The Opinion of the United States Circuit Court of Appeals in the consolidated actions Nos. 73-1403 and 73-1408, following this Court's decision in *Milliken* v. *Bradley,* 94 S. Ct. 3112 (1974) was rendered on December 11, 1974, and has not been officially reported. It appears in the separate Appendix at pages 87 to 95.

The original order of the District Court declining to cross political boundaries and dismissing the Anchorage School Board, entered October 18, 1973, appears in the separate Appendix at pages 1-3.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 11, 1974. This petition for writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1241(1) (App. 96).

STATEMENT OF QUESTIONS PRESENTED

I. Does Court of Appeals' Decision, Reversing District Court's Findings, that Contiguous School Districts Retain Vestiges of State-Imposed Segregation, Impose a Requirement of Metropolitan "Racial Balance" In Conflict with the Principles Laid Down by the Decisions of the Supreme Court?

II. Does Court of Appeals' Decision, Reversing District Court Decision That Contiguous School Districts Are Unitary and That the School Boards Effectively Eliminated Desegregation After *Brown* I, Conflict with Decisions of Supreme Court that School Authorities Are Not Constitutionally Required to Make Year-By-Year Adjustments of the Racial Composition of Student Bodies Where, Following 1965, Regrettable Imbalance Proliferated Because of Socio-Economic Factors, and not De Jure Acts or Failure to Act and Despite Resistance by the School Authorities?

CONSTITUTIONAL PROVISION AND KENTUCKY STATUTES INVOLVED

The Constitutional provision and the Kentucky statutes relevant to the issues in this case are: U.S. Constitution Amendment XIV, §1; Kentucky Revised Statutes, Chapter 160, relating to school districts. These are set forth in the separate Appendix at pages 94-96.

STATEMENT OF THE CASE

Two class actions concerning desegregation of contiguous school districts, the Louisville Independent School District and the Jefferson County School District in Jefferson County, Kentucky, against the boards of education of the respective districts and their superintendents contended, inter alia, that vestiges of state-imposed segregation existed in those school systems which had, prior to 1954, been racially dual systems by virtue of state law. Intervening third parties also named as additional party defendant a third small independent school district in the county and contended that all three School districts were in constitutional violation which could only be corrected by merger of the school districts. The United States District Court for the Western District of Kentucky conducted separate trials, rendered separate opinions and dismissed both actions, holding that each of the two major school districts involved operated a unitary school system in accordance with the Constitution.

On December 28, 1973, the Sixth Circuit Court of Appeals determined that the Jefferson County school system had not been fully converted to a unitary system where 56% of all its black elementary students attended three of 74 elementary schools and these three schools were surrounded by several all-white or virtually all-white schools, and further determined that with reference to the Louisville Independent School District, that 80% of its schools were racially identifiable", 20 years after the decision in *Brown* I, and that such a system was not a unitary system. The Court concluded that all vestiges of state-enforced discrimination must be eliminated by the District Judge within each district and to accomplish such purpose, state-created school district lines should impose no barrier. The Court of Appeals remanded the action to the District Court for proceedings to formulate a desegregation plan for all school districts in Jefferson County, Kentucky, directing the District Court to include the previously dismissed small Anchorage Independent School District, and required the plan of desegregation to be made effective for the 1974-75 academic year. Thereupon, the District Court entered appropriate orders in accord with the Court of Appeals' mandate. The two larger school systems in Jefferson County filed a desegregation plan. The District Court conducted hearings and entered a judgment on July 23, 1974, merging all three school systems and directing cross-district transportation of more than 30,000 additional children and provided for the implementation of such plan by September, 1974.

Two days later on July 25, 1974, the Supreme Court of the United States granted petitions of certiorari filed by all three school districts in Jefferson County, Kentucky, while concurrently rendering its full opinion in the Detroit case of *Milliken* v. *Bradley, supra.* This Court's order in the three Jefferson County cases vacated the Court of Appeals' judgments and remanded the cases for further consideration in the light of *Milliken* v. *Bradley* (App. 105). Immediately following this Court's order granting certiorari, the District Court, *sua sponte,* vacated its judgment of July 23, 1974, pending further instructions from the United States Court of Appeals.

On August 8, 1974, the Court of Appeals directed the parties to file supplemental briefs addressed to all questions applicable to the reconsideration of its prior opinion of December 28, 1973. Oral arguments were heard on October 14, 1974, and on December 11, 1974, the United States Court of Appeals for the Sixth Circuit rendered its opinion and judgment in which it determined that the Supreme Court's opinion in *Milliken* v. *Bradley, supra,* of July 25, 1974, and its order of remand in no way required a reconsideration of the Court of Appeals' prior opinion insofar as it held that *both* the Louisville and the Jefferson County school districts were operating dual school systems from which all vestiges of state-imposed segregation had not been eliminated as required by law.

The Court of Appeals thereupon addressed its opinion *only* to its prior holding that the District Court, in approving or formulating a plan of desegregation for

Jefferson County, Kentucky would have the power to require that state-created school district lines could be disregarded. The Court of Appeals concluded that there were material and controlling distinctions between the facts of the Jefferson County case and the facts before the Supreme Court in the *Milliken* case, and therefore reinstated its opinion of December 28, 1973, modified in three respects.

First, the Court of Appeals ordered the District Court to join the small independent Anchorage school district as party defendant *only* if it deemed it necessary to provide an adequate remedy. Secondly, effectiveness of the order of the District Court providing an inter-district remedy was directed to be postponed until all appeals in connection with any such order had been exhausted or in the event no appeals were taken, until the time for such appeal had expired. Third, the Court of Appeals directed that in no event should the District Court order a metropolitan desegregation plan to take effect before the beginning of the academic year beginning in September, 1975.

Immediately upon rendition of the Court of Appeals' opinion, respondents, moved the District Court to reinstate its judgment of July 23, 1974, merging all three school districts and ordering the implementation of a desegregation plan which provided for the transportation of an additional 30,000 students without reference to district lines. On January 30, 1975, the District Court entered an order refusing to reinstate its July, 1974 judgment, taking note of the 1974 Congressional "Amendments to the Education Acts of 1974"

(20 U.S.C.A. 1714(a), *et seq.*), and also noting the fact that a merger of the two larger school districts was contemplated under state procedures. Jefferson County Board of Education was directed to submit by April 30, 1975, a desegregation plan that would eliminate all vestiges of state-imposed segregation throughout Jefferson County and to incorporate the provisions of the Court's previous judgment of 1974 relative to implementation of that plan. The District Court's order makes provision for all other parties to file objections to the new plan and for such alternative plans as any party desired to submit; and it provides for the conduct of *evidentiary hearings* for the final development of a desegregation plan and such other proceedings, including a consideration of the small independent district of Anchorage, as is necessary to enable the Court to comply with the opinion of the Circuit Court of Appeals of December, 1974. It is anticipated that such hearings will be conducted in July 1975.

On February 28, 1975, the Board of Education of the Commonwealth of Kentucky, acting pursuant to the powers conferred upon it by Kentucky statute (App. 95, KRS 160.041), ordered a merger of the Louisville Independent School District and the Jefferson County School District as of July 1, 1975.

Since the action of the Kentucky State Board of Education merging the Jefferson County district and the Louisville Independent School District effective July 1, 1975, renders the legal question of crossing school district lines between those two districts moot and leaves that question open only as to the right of

the District Court to involve the independent district of Anchorage, this petition of certiorari is solely for the purpose of reviewing the decision of the United States Court of Appeals for the Sixth Circuit of December 11, 1974, incorporating the opinion of the Court of Appeals of December 28, 1973, which determines that neither the Louisville Independent School District nor the Jefferson County school district is a unitary system but that both are presently operating dual school systems from which all vestiges of state-imposed segregation have not been eliminated.

The Court of Appeals in its December, 1974 opinion clearly states that it construes the Supreme Court's opinion in *Milliken* v. *Bradley* (and the Supreme Court's order remanding these cases) as in no way requiring a reconsideration of its previous holding of December, 1973 that both the Louisville and the Jefferson County school districts are operating dual school systems. The District Court made findings of fact and conclusions of law determining that *both* Jefferson County and the Louisville Independent School District had eliminated all vestiges of state-imposed segregation and are operating unitary districts. The Court of Appeals in its December, 1973 opinion and in its December, 1974 opinion rejected the conclusions reached by the District Court and found both districts to be dual systems in violation of constitutional requirements. A brief summary of the findings and conclusions of the District Court and of the Court of Appeals' decision follows:

The respondents, plaintiffs in the District Court, in their charges against the two school districts, from the outset made it clear that they were *not contending* that the two school systems were unconstitutionally maintained because of *poor quality or substandard education.* The District Judge was advised in the opening statements in both cases by counsel for the respondents:

> "We are proceeding on the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The only problem is that the schools are racially identifiable." (Separate Appendix, page 103).

Admitting that both boards undertook, following the decision in the *Brown* I, to desegregate the school systems, plaintiffs contended that the efforts of the boards had not been sufficient and all vestiges of state-imposed segregation had not been eliminated because of the existence in both systems of *racially identifiable schools.* The evidence offered by the respondents in both trials was confined almost entirely *to statistical and demographic information* relating to the two school systems. With reference to the Jefferson County school district the thrust of the complaint was that the board had created and redrawn attendance zones in such a way as to increase, rather than reduce, the degree of racial segregation and in particular it complained that the board had rebuilt Cane Run Elementary School in such a manner as to increase segregation. It was asserted that the board continued to maintain Newburg Elementary School as an all-black school and had con-

structed new schools and redrawn attendance lines in other surrounding areas in such a method as to increase rather than decrease racial segregation.

The evidence reflected that the Jefferson County school system encompassed approximately 280 square miles as compared to the Louisville Independent District which contained approximately 65 square miles; that the Jefferson County Board was operating 103 schools of which 74 were elementary schools, 6 middle schools, and 18 combined junior and senior high schools. The number of pupils in the Jefferson County system was 95,800 of which 92,100 were white and 3,700 were black so that the percentage of black students to white students in the entire system was 4.01%. None of the respondents' evidence criticized the middle schools or the senior high schools operated by the Jefferson County Board and respondents' principal evidence was relegated to the fact that at the present time 56% of the black elementary students in the entire county district attended three schools and that two of the three schools, including one which was virtually all-black, were surrounded by virtually all-white schools. The evidence established that in some of the surrounding white schools overcrowding was experienced, whereas the one all-black school was underutilized.

The evidence introduced by the Jefferson County Board reflected the efforts made since 1954 to abolish pre-*Brown* vestiges of state-imposed segregation, including the location of new schools, the closing of certain all-black schools, the changing of school attendance zones to encourage desegregation and the integration of

faculties and administrators as far as possible. The evidence introduced by the county school board was directed to the proposition that despite its efforts to dismantle the dual system which had existed by state law prior to 1954, the movement of population and the concentration of black population in specific areas of the county due to housing patterns and other factors over which the school board had no control resulted in allegedly racially identifiable schools on a de facto basis.

The District Judge found no support for the argument that the Jefferson County Board was operating a dual system and rejected as unrealistic the contention of the respondents that the school board was required to transport white children into the one all-black Newburg school from adjoining districts and at the same time transport black children who lived near that school to white schools surrounding it, thus cross-busing or "leap-frogging" these children to achieve some sort of racial balance. The District Court found positive evidence of activity by the county district and affirmative action to close schools and take other steps to desegregate the schools and the Court rejected any particular degree of racial balance as being a constitutional requirement and concluded that there was no denial of any child's right to a quality education by reason of his race.

The District Court found, on the contrary, that the decreased use of the all-black Newburg school was the result of the deliberate action of the County Board to desegregate its school system, that the increasing percentage of black children in the neighboring Price

Elementary School and indeed, the location of the school itself was an attempt by the board to relieve the neighboring over-crowded Rangeland area and to achieve an approximate black population ratio of 20-25% when the Price school opened. With reference to the allegations concerning the Cane Run School, the District Judge found that the relocation of that school at its former site was appropriate and that it was in the most practical geographic position possible to serve the population of the area and that the sudden influx of black students in 1971-72 was not an occurrence which could have been reasonably anticipated by the school board and that the departure of nearly 50% of the white students from the district within approximately three school years was a racial imbalance resulting from de facto causes and not de jure acts or any failure to act.

With reference to the Louisville Independent School system, the District Court, in a meticulously careful examination of the situation, concluded that the contention of the respondents, that racial "imbalance" existed in the Louisville school system was not equivalent to "vestiges of a dual school system which must be dismantled," under the decisions of this Court. The School Board conceded that it had the burden to come forward and show to the Court's satisfaction that the imbalance was not due to any invidiously discriminatory actions or failures to act, by the Board or the State, but that the imbalance resulted from factors beyond the authorities' control, despite every reason-

able and practical effort to maintain a unitary school system.

The Court in a detailed opinion traced the spectacular movement of the black population of the City of Louisville from the central area of that city to the western area of the city *as a result of urban renewal.* The Court noted that the federal agencies primarily concerned with enforcing the mandate of the two *Brown* decisions and other decisions had repeatedly concluded, after lengthy and searching examination and studies of the ways in which the Louisville district might achieve greater racial balance in its schools, that it could not be improved upon. From 1965 through 1972, HEW had never disapproved or denied a grant in aid to the Louisville district for the reason that it was not a unitary district, but on the contrary, as late as 1972, it had reiterated its position that the Louisville district was a unitary one.

The District Court noted that the respondents tacitly conceded that any further efforts by the Louisville School Board beyond what it was doing to achieve greater racial balance would result in a systemwide tilt, leaving the district blacker and poorer and more segregated and noted plaintiffs agreement that only by a merger of the three school districts in the county could any greater degree of integration concievably be accomplished. The District Court found no evidence that the board's student assignment plan or its method of establishing school attendance zones had contributed to the racial imbalance that existed in the schools, that the Louisville board had closed twenty-three schools,

that in 13 of these closings, greater integration had resulted, that the Louisville board had accomplished a complete faculty integration, that the majority of the schools that had been closed were black schools, and that the children that had attended those schools were transferred to schools which had been formerly white, thereby establishing even further desegregation. In short, the District Court found that the board's school closing policy was non-discriminatory and not designed to perpetuate a dual school system, but on the contrary, had been designed to achieve maximum desegregation (App. 21).

The Court of Appeals in its second opinion, in December, 1974, made some reference to the construction of Atherton High School in the southeastern part of the city but beyond the boundary of the Louisville Independent School District. The Court of Appeals seemed to feel that this action was taken by the Louisville school board as a deliberate act opposed to desegregation. The fact is well known to every citizen of Louisville and Jefferson County and the District Court found as a matter of fact that the construction of the new Atherton was not undertaken nor designed to perpetuate a dual system or to create a racial imbalance but that indeed after the new Atherton High school was opened, more blacks attended the new facility than had attended the old facility near the heart of the city (App. 25). The District Court found that the Louisville school board had in no way "gerrymandered" the attendance zones and that such attendance zone changes that had been made were affirmatively directed toward

better racial balance and that no invidious discrimination nor de jure acts on the part of the Louisville School Board had contributed to the regrettable "racial imbalance" found in the City of Louisville, following 1965.

The District Court also found that there was not one scintilla of evidence offered during the two trials to the effect that the State Board of Education, the Superintendent of Public Instruction, the General Assembly of the Commonwealth of Kentucky, or any other state agency had done anything whatsoever to perpetuate a dual school system, or that they had done anything to impede the desegregation effort of the two local school districts within the Commonwealth of Kentucky.

Finally, after lengthy and careful consideration of voluminous evidence regarding both school systems, the District Court concluded that they had moved with dispatch and diligence to desegregate the schools and faculties following *Brown* I and *that particularly since 1965, regrettable racial imbalance began which did not germinate from nor proliferate from any acts or failures to act by the school boards or state authorities.* The district court found specifically that the proliferation had been the result (in spite of the efforts of resistance by the school boards) of white flight, neighborhood housing patterns, and socio-economic factors, and not de jure acts or failure to act. Finding that the school officials had been aware of the responsibilities imposed upon them by the advancing state of the law as it was developed by the courts, the District Court concluded that *both school boards* had undertaken to

comply with the letter and the spirit of the law and that there was not a constitutional violation of the rights of the plaintiffs or any other children in the school systems and that both school systems were unitary. Accordingly, the Complaints were dismissed.

The Court of Appeals determined with regard to the Jefferson County school system that all vestiges of state-imposed segregation *had not been eliminated* so long as its Newburg school district remained virtually all-black and so long as 56% of the black elementary school children in the system were required to attend three schools (two of which were surrounded by a number of virtually all-white schools which were overcrowded), while at the same time the Newburg school was not used to capacity. The Court of Appeals concluded that Jefferson County had not been fully converted to a unitary system and that it was required to take affirmative action, not only to eliminate the effect of state-imposed segregation of the past, *but also to avoid future discrimination by insuring that no other school in addition to Newburg would ever become racially identifiable* as a black school. The Court of Appeals found that the Jefferson County school district thus had three elementary schools that "either are or are rapidly becoming 'racially identifiable' ". It declared that Newburg school, a pre-*Brown* black school, was racially identifiable and that the Price and Cane Run schools were rapidly *becoming* racially identifiable as black schools. This condition, it concluded, did not conform to the constitutional standards set by the courts.

The Court of Appeals determined that the Louisville Board of Education was not operating a unitary school system because *its transfer provision was not a permissible method for a school board to employ* in dismantling a dual system and eliminating all vestiges of state-imposed segregation, particularly where that method permitted racially identifiable schools to continue to exist. The Court of Appeals rejected the District Judge's findings and the contention of the Louisville Board that *population shifts* had changed the racial composition of some of the schools and had contributed to the existence of racially identifiable schools. The Court of Appeals concluded that shifts of population which changed the racial composition of many neighborhood schools did not relieve the Louisville system of its duty to convert to a unitary school system.

Concluding that both school boards had not eliminated all vestiges of state-imposed segregation and that the District Judge had erred in his conclusion and determination that the two districts were unitary, the Court of Appeals reversed the Judgment of the District Court and remanded the case for proceedings to formulate a desegregation plan for all three school districts in Jefferson County.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erroneously Equates the Existence of "Racially Identifiable" Schools in Contiguous Districts With Unconstitutionality and Substitutes in Effect a Constitutional Requirement That in Each School in the Metropolitan Area There Must be a Racial Composition Substantially

Consistent With the Areawide Black-White Population in Conflict with Decisions of this Court.

II. The Court of Appeals Erroneously Ignored or Disagreed With the District Court's Finding That School Boards, Following *Brown* I, Eliminated Vestiges of State-Imposed Segregation and That Thereafter Socio-economic Conditions and Housing Patterns Caused Segregation Completely Beyond the Control of School Authorities and Despite Their Efforts. This Action Conflicts With Principles Set Forth in the Opinions of This Court.

The order of the United States Circuit Court of Appeals remanding this case to the district court does not affect the merits of this petition for certiorari. In this same action this Court has previously granted a writ of certiorari, notwithstanding the order of the Court of Appeals remanding the case to the district court. Likewise in *Milliken* v. *Bradley,* the writ of certiorari was granted notwithstanding the remand order in that case contained in the opinion of the Court of Appeals. This Court has previously determined that a writ of certiorari may issue notwithstanding a remand of the case by the Court of Appeals if there is present an important and clear-cut issue of law fundamental to the further conduct of the case. *U. S.* v. *General Motors Corporation,* 323 U. S. 373 (1944); *Gillespie* v. *U. S. Steel Corporation,* 379 U. S. 199 (1964). Furthermore, petitioners are compelled to file this petition for certiorari at this time because of the Court of Appeals' opinion reaffirming and reinstating its previous decision on the fundamental question of

the constitutional violation of the petitioners. The "law of the case" doctrine, while not an absolute one, would prevent a reconsideration of this vital matter upon a subsequent appeal from a judgment entered on the mandate of the Sixth Circuit Court of Appeals. *General American Life Insurance Company* v. *Anderson,* 156 F. 2d 615 (1946)—C. C. A. Ky.; *Hildreth* v. *Union News Company,* 315 F. 2d 548, Cert. denied 84 S. Ct. 69, 375 U. S. 826, 11 L. Ed. 2d 59.

We do not seek to revive here the former controversy concerning the distinction between de jure and de facto segregation, because we realize the validity of the statement of Mr. Justice Powell in *Keyes* v. *School District No. 1,* 413 U. S. 189, 37 L. Ed. 2d 548, 93 S. Ct. 2686, that the decisions of this Court from 1954 to 1971 extended the concept of state neutrality and transformed it into the present constitutional doctrine requiring affirmative state action to desegregate school systems. Both school boards assumed this burden in the district court and recognized that the respondents were not required to prove that the school boards' actions "caused" the current alleged school segregation. Both boards recognized in the trial on the merits, and the District Court found as a matter of law, that the school authorities *had the burden of showing* that the current segregation that does exist in the two districts was in no way the result of past segregative actions. The District Court found that the school boards met this burden, and that each had taken deliberate, affirmative steps to remove the vestiges of state-imposed segregation existing prior to 1954, created by Kentucky law.

The District Court concluded, and we submit properly, that the existence of some schools within the two districts which were not racially balanced according to the composition of the racial population of the community were not the result of factors which could be controlled by the school authorities.

This Court, in its decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), stated:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentration in some schools." 402 U. S. 1, 23.

This Court recognized that despite all efforts, no matter how well intended by school authorities, and even when those authorities actively and positively engaged in attempting to dismantle a dual system, that:

> "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. *One vehicle can carry only a limited amount of baggage.*" 402 U. S. 1 at 22 (Emphasis ours).

The District Court found facts from which it is reasonable and proper to conclude that neither the Jefferson County school board nor the Louisville school board had adopted a "racially neutral" plan of assigning

children. They had not employed methods which were racially neutral in operation. Respondents in the District Court had advocated a "simple expedient" which was to transport large numbers of white children from their homes to schools which were predominantly black while at the same time transporting black children out of their neighborhood schools into distant areas in order to distribute them in schools containing large numbers of white children. Such a procedure may indeed be necessary where segregation of children denies them equal opportunities and is the result of deliberate and invidious racial segregation, but the Court of Appeals itself had determined in *Deal* v. *Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966) and *Deal* v. *Cincinnati Board of Education,* 419 F. 2d 1387 (6th Cir. 1969), twice reviewed by the Supreme Court of the United States, that:

> "We hold that there is no constitutional duty on the part of the board to bus Negro or white children out of their neighborhoods or to transfer classes for the *sole purpose of alleviating racial imbalance that it did not cause.*" (Emphasis ours.)

The decision of the Court of Appeals in this case conflicts with the decisions of this Court because, as we shall demonstrate, the Court of Appeals consistently has equated the existence of "racially identifiable schools" with unconstitutionality and imposed on the school boards an affirmative responsibility to see that no other school *would ever become* "racially identifiable". This holding is erroneously predicated upon

the assumption that some particular degree of racial balance is commanded by the Constitution.

A fair reading and interpretation of the Court of Appeals' decision compels the conclusion that that Court equated racial balance with constitutionality, and conversely, concluded that the presence of "racially identifiable" schools within a school system which had previously been a dual school system, constitutes *in and of itself a denial of* equal protection of the law. The Court of Appeals has in reality decreed that the existence of one virtually all-black school among 74 elementary schools, surrounded by black residential population, when coupled with the fact that 56% of all the black elementary schools in the entire system attend this school and two others, creates an unconstitutional condition where adjacent schools have an increasing black population. By basing its finding that the Jefferson County school board operated a dual school system upon statistical "imbalance" found in three elementary schools, the Court of Appeals, in effect, has determined that a school system with a history of de jure segregation cannot maintain neighborhood elementary schools where the system experiences a high concentration of minority residents in one or two neighborhoods. Such a holding is based upon the erroneous equation of the concept of the unconstitutionality of "racially identifiable" schools with the perceived constitutional command that respondents have a substantive right to require that every school in the school system, or as here, the entire metropolitan area, reflect the racial composition of the student population of the entire community.

This Court has never adopted such a constitutional standard. *Milliken* v. *Bradley, supra.*

With reference to the Jefferson County school district, the Court of Appeals appears to ignore the teaching of the *Swann* decision that dismantling a dual school system does *not* require any particular racial balance in each school and that "some small number of one-race or virtually one-race schools within a district is not in and of itself a mark of a system that still practices segregation by law". Nor, is this the first time the Sixth Circuit Court of Appeals has so erroneously concluded. The majority opinion of the Chief Justice in *Milliken* v. *Bradley* contains statements which are critical of the opinion of the Court of Appeals for proceeding on the assumption that the Detroit schools could not be truly segregated unless the racial composition of the student body of each school substantially reflected the racial composition of the metropolitan area as a whole. The particular quotation to which we have reference is as follows:

> "Viewing the record as a whole, it seems clear that the district court *and the court of appeals* shifted the primary focus from a Detroit remedy to the metropolitan area *only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable.* Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—*in their view of what constituted desegregation*—unless the racial composition of the student body of each school substantially reflected the racial

> composition of the population of the metropolitan area as a whole." *Milliken* v. *Bradley*, —— U. S. —— (1974) 94 S. Ct. 3112, p. 3125.

The Appellate Court chose to ignore, or at least discount entirely, the conclusion of the District Judge, based upon the undisputed evidence that the Jefferson County Board for a number of years had consistently engaged in an effort to integrate the children in the solidly black Newburg community by assigning a number of the school children from that community to adjacent schools with a predominantly white pupil population. The fact that the school board had erected two middle schools in the area for the purpose of reducing the number of black students at Newburg and thus contributing to the desegregation of the school system as a whole was apparently overlooked. The Court of Appeals was required to look ten miles across the county to unrelated Cane Run school to find the statistical support for its conclusion that 56% of the black children in the entire system attended three schools. The District Court found, and the evidence was undisputed, that there is no relationship between the Price-Newburg area problem and the Cane Run school attendance zone problem and the rebuilding of that school. Indeed, the Court of Appeals conceded that the situation at Cane Run might not compel a conclusion that the board fostered segregation.

Necessarily, in a school system with a white pupil population of 96% (a condition created by housing patterns, urban renewal and industry location, and not by any design or activity of the Jefferson County school

board), where the black population is highly concentrated in two residential areas, it is not strange that several virtually all-white schools may be found in the system and one nearly all-black school.

In fairness to the Court of Appeals, its opinion does not at any place make the dogmatic statement that racial balance by a strict mathematical formula is required, nor does the opinion, in dealing with the remedies which it required the District Court to incorporate in a desegregation plan, designate exactly any specific remedy. But because the Court of Appeals has required racial balance by equating constitutionality and racial balance or conversely, by declaring "racially identifiable" schools vestiges of state imposed segregation, it has by direct and positive implication required "racial balance" which in the particular demographical situation can be accomplished only by *massive transportation* of children considerable distances. This is the only remedy that can transform what the Court of Appeals has perceived as "racially identifiable" schools into "racially balanced" schools. All the other court sanctioned tools, clustering, paring, majority to minority transfer, magnet schools, the whole gamut, cannot overcome shifting housing and socio-economic patterns of the magnitude experienced in Jefferson County, Kentucky, in the decade 1965-1975. It is not alone "white flight" but also "black movement and concentration" which confronts the school authorities. *Demographic stability in a mobile society is more baggage than the school vehicle can carry.*

In dealing with the Louisville Independent district, the Court of Appeals determined that all of the

efforts of that school board in the relocation of schools, the assignment of pupils and its geographical transfer plan did not meet the constitutional requirements of affirmative action on the part of that board because of the resulting racial imbalance, to wit, racial identifiability of a number of the schools. The evidence was undisputed that about 51 percent of the student population of the district is black. The demographic data relative to attendance zones reflected that the school population generally reflected the neighborhood population. During the 20-year period following *Brown,* a tremendous movement of the population caused varying racial percentages in the schools. The changing student population corresponded with the changing racial housing pattern caused primarily by white exodus from the west end of the City of Louisville. The Louisville student assignment plan described as a "geographic zone plan with provisions for a transfer" was not a warmed-over version of the northern system of "open enrollment" or what southerners have called "freedom of choice", nor is it a neighborhood school plan in its entirety. The district court found that zones were established to meet the needs of the surrounding community area as the needs related to the capacity of the schools; that there was not the slightest evidence that the board's student assignment plan or the establishment of school attendance zones had contributed to racial imbalance that existed in some of the Louisville schools. Changes that were made in the attendance zones from time to time, the Court found, were directed toward better racial balance.

The second opinion of the Court of Appeals in December, 1974, while directed to the issue of inter-district remedy, reveals plainly the complete lack of understanding by that Court of the factual situation in Jefferson County, Kentucky, in at least two major respects. Atherton High School, which the Court of Appeals described as being located in the county and away from the core city of Louisville, indicating a disregard for school district lines and creating racial imbalance in the schools, in truth and in fact, as is well known to every person in the community as well as the District Judge, has no relation whatsoever to racial composition of the school and indeed, as found by the District Court, has more black students in it in its present location than it did in its previous location in the core area. The Court of Appeals also concluded that because the Louisville school district boundaries were not contemporaneous with the boundaries of the city of Louisville, about 10,000 white children who actually reside within the city are required to attend schools in the county which materially aggravates the difficulties in disestablishing the dual city school system. Nothing could be further from the truth. While the fact may have some relevance to legal issue of school district lines, there is not one scintilla of evidence in the record that the school district lines were drawn or maintained because of any connection with the racial composition of the schools contained in the area. The sole cause was the annexation fever of the 1950's.

We recognize the fact that in the *Milliken* opinion this Court was considering the question of inter-dis-

trict remedy and the equitable powers of the district court and was not concerned with whether or not the metropolitan Detroit schools were in constitutional violation. The concurring opinion of Mr. Justice Stewart specifically points out that "the majority opinion does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction." *Milliken* v. *Bradley,* 94 S. Ct. 3112 at page 3131.

We believe, however, that two footnotes to the Chief Justice's majority opinion are vitally important in a consideration of the matter here presented as to whether or not the two districts in Jefferson County are in constitutional violation. We refer, of course, to footnote 19 of the majority opinion, 94 S. Ct. 3112, at page 3125, and footnote 22 of that majority opinion found at 94 S. Ct. 3112 at p. 3128. These two footnotes are set out here and we have italicized those portions which we think are critically important to the determination of the issue herein. They are:

> "Disparity in the racial composition of pupils within a single district may well constitute a 'signal' to a district court as the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. In *Swann,* for example, we were dealing with a large but single, independent school system and a unanimous Court noted: 'Where the proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of

> one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory.' Id., p. 26. See also *Keyes, supra,* 413 U. S. at 208. *However, the use of significant racial imbalance in schools within an autonomous school district as a signal which operates* simply to shift the burden of proof, is a very *different matter than equating racial imbalance with a constitutional* violation calling for a remedy. (Keyes, supra, also involved a remedial order within a single autonomous school district." 42 U.S.L.W. 5249, p. 5256, F.N. 19. (Emphasis added.)

The opinion of the Sixth Circuit Court of Appeals which we are in reality seeking to review here is the opinion written before this Court's decision in *Milliken* v. *Bradley* on July 25, 1974. We believe it suffers from the same defects that the Chief Justice criticized in the Court of Appeals' opinion in *Milliken* v. *Bradley* —an erroneous view that a particular racial makeup of the school district's population brands that district as being in constitutional violation regardless of the efforts of the school authorities. Footnote 22 of the Chief Justice's opinion in *Milliken,* we think, supports our view.

> "The suggestion in the dissent of Mr. Justice Marshall that schools which have a majority of Negro students are not 'desegregated', whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases. In *Green* v. *County School Board of New Kent County,* 391 U. S. 403 (1958), for

example, the Court approved a desegregation plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 43% white. In *Wright* v. *Council of the City of Emporia,* 407 U. S. 451 (1972), the optimal desegregation plan would have resulted in the schools being 66% Negro and 34% white, substantially the same percentages as could be obtained under one of the plans involved in the case. And in the *United States* v. *Scotland Neck Board of Education,* 407 U. S. 484, n. 5 (1972), a desegregation plan was implicity approved for a school district which had a racial composition of 77% Negro and 22% white. *In none of these cases was it even intimated that 'actual desegregation' could not be accomplished as long as the number of Negro students was greater than the number of white students."* 49 U.S.L.W. 5249, 5258, F.N. 22. (Emphasis added.)

CONCLUSION

The Circuit Court of Appeals has imposed as a condition of constitutional validity an unspecified degree of racial balance and, contrary to the opinions of this Court, has equated the existence of "racially identifiable" schools with unconstitutionality. The District Judge found that the two school boards had moved with dispatch and diligence following *Brown* I to integrate the schools and faculty and that they had succeeded (App. 35). Since 1965 the District Court found regrettable racial imbalance proliferating, in spite of resistance by the boards, due to neighborhood housing patterns and socio-economic factors, not de jure acts or failure to act. The Court of Appeals either ignored this finding or disagreed with the conclusion and found that the boards had defaulted in their duty. This conclusion ignores this Court's determination in *Swann, supra,* that school authorities are not constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished.

The Constitution, as interpreted by this Court, requires that school authorities exclude no pupil of a racial minority from any school directly or indirectly on account of his race. Respondents conceded at the outset that the schools of the Jefferson County system are not racially identifiable because of poor quality or substandard education. They claim the schools are racially identifiable because they are not racially balanced. This Court has not construed the Constitu-

tion to require that every school in a system with a history of de jure segregation reflect the racial composition of the metropolitan area within which the school system is located.

The 1974 decision of the Court of Appeals presents issues of imperative public importance and conflicts in principle with decisions of this Court as set forth herein.

We respectfully submit that a writ of certiorari be granted to review that judgment.

JOHN A. FULTON
WILL H. FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Petitioners, Board of Education of Jefferson County and its Superintendent

Of Counsel:

WOODWARD, HOBSON & FULTON

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Supreme Court Of The United States

October Term, 1974

No. 74-1123

**BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY
DR. NEWMAN WALKER, SUPERINTENDENT - - - - -Petitioners**

versus

**JOHN E. HAYCRAFT
HAZEL K. LANE
LYMAN JOHNSON
RICHARD MILLER
BARBARA BYRD
AARON HOWARD
JOHN R. HUGHES
TERESA BLACK
JOHN SCHMIDT
EARL ALLUISI
AMERICAN FEDERATION OF TEACHERS - - - - - Respondents**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**HENRY A. TRIPLETT
HOGAN, TAYLOR, DENZER & BENNETT**
231 S. Fifth Street, Third Floor
Louisville, Kentucky 40202
Attorney for Petitioners

LAWYERS PRINTING CO., P. O. BOX 7742, LOUISVILLE, KY. 40207

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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

BOARD OF EDUCATION OF
LOUISVILLE, KENTUCKY
DR. NEWMAN WALKER
SUPERINTENDENT — *Petitioners*

versus

JOHN E. HAYCRAFT
HAZEL K. LANE
LYMAN JOHNSON
RICHARD MILLER
BARBARA BYRD
AARON HOWARD
JOHN R. HUGHES,
TERESA BLACK,
JOHN SCHMIDT,
EARL ALLUISI
AMERICAN FEDERATION
OF TEACHERS — *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on December 11, 1974.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been published but is contained in the Appendix of this petition (pp. 87a). The memorandum opinion and judgment of the United States District Court has not been published but is contained in the Appendix of this petition (pp. 1a).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered December 11th, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

> " . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

United States Constitution, Amendment XIV

> " . . . nor deny to any person within its jurisdiction the equal protection of the law."

QUESTIONS PRESENTED

1. Where a United States District Court, in a school desegregation case, found that the Board of Education of Louisville, Kentucky, converted the school system from a dual system to a unitary system within two years from this Court's decision in *Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L.

Ed. 873, 38 A.L.R.2d 1180, and that changing housing patterns and other factors beyond the Board's power to control or remedy caused a racial imbalance in many of its schools, and where there was no claim of invidious discrimination or any discrimination on the part of the Board of Education of Louisville, Kentucky, does the fact that schools within the Louisville Independent School District were lawfully segregated in 1954 permit a finding by a United States Court of Appeals that the Board of Education of Louisville, Kentucky, is maintaining and operating a dual school system?

2. Where a United States District Court in a school desegration case found that the Board of Education of Louisville, Kentucky, did and has done all it could, short of cross-transportation or bussing, to racially balance the schools within its jurisdiction, and where it was found that cross-transportation or bussing within the Louisville system alone would accelerate the flight of the whites to the suburbs and elsewhere, thus resulting in the district become blacker and poorer, and where on appeal the United States Court of Appeals for the Sixth Circuit recognized this fact but did not expressly order desegregation on a countrywide basis or on a metropolitan basis, does such a decision comport with the previous school desegregation opinions of the United States Supreme Court, including and since *Brown* v. *Topeka, Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180?

3. Does the opinion and judgment of the United States Court of Appeals in *Newburg Area Council* v. *Board of Education* (App. 87a) comport with this Court's order of remand and to reconsider this case in light of *Milliken* v. *Bradley*, 41 L. Ed. 2d 1069?

STATEMENT OF THE CASE

This is a school desegregation case brought by the respondents against the petitioners, Board of Education of Louisville, Kentucky, and Dr. Newman Walker, its superintendent. The trial of this case took place in Louisville, Kentucky, before the Hon. James Gordon, United States District Judge for the Western District of Kentucky. The case was tried December 1-7, 1972 (1a), and after hearing voluminous testimony and considering more than 130 exhibits, the District Court made complete findings and on March 8, 1973, rendered a judgment to the effect that the Board of Education of Louisville, Kentucky, and its superintendent, had desegregated the Louisville School System and are now operating a unitary school district (35a).

In the same litigation, the Board of Education of Jefferson County, Kentucky, and its superintendent, were sued and the same relief was demanded. The United States District Court made similar findings and entered a similar judgment relative to the Jefferson County School District (36a).

This petition relates only to the claims by the Board of Education of Louisville, Kentucky, and its superintendent. The Board of Education of Jefferson County, Kentucky, authorized its counsel to prepare and file with this Court a petition for Certiorari (99a).

Before the Supreme Court's decision in *Brown* v. *Board of Education of Topeka, Kansas (Brown I)* and pursuant to state law, all schools within Kentucky were segregated. After *Brown I* petitioners put into operation a school desegregation plan. The plan was a geographic zone plan with a transfer provision, although bias was

not recognized as a supporting reason for a transfer (8a). The faculty desegration plan became operational in 1959 (18a).

The petitioner, Board of Education of Louisville, Kentucky, exists pursuant to Kentucky Revised Statutes 160.160. It controls all public schools within the Louisville Independent School District. Louisville never provided any transportation for its students before *Brown I* and does not now. It operates 75 schools with all of its junior high schools and elementary schools having separate attendance zones and districts. Two of its high schools have district-wide attendance zones, three high schools have separate attendance zones, and three high schools share a common attendance zone (21a).

At the commencement of the 1972-1973 school year, its pupil population was 45,570, with 22,637 of total being white and 22,933 being black. At the commencement of the 1956-57 school year, 45,841 children were enrolled, with 12,010 being black and and 33,831 being white (11a).

The elected School Board is composed of three whites and two blacks, all of whom are elected at large from the Louisville Independent School District, a district in which white citizens outnumber black citizens three to one (11a).

The evidence in the District Court resulted in a finding that the Department of Health, Education and Welfare had determined that the Louisville Independent School District was a unitary school district (12a).

The evidence at the trial caused the Court to find that the tip ratio theory or the flight of the white theory had proven itself within the Louisville Independent School District and that further efforts by petitioner will

result in more segregation rather than desegregation (15a).

The District Court found that the original assignment plan was reasonable and that the transfer provision would not have resulted in more desegregation (16a).

The United States District Court found that the petitioners' school discontinuation policy was non-discriminatory and was designed to achieve maximum integration (17a).

The United States District Court found that the faculty and staff had been desegregated and that there were no vestiges of a dual school system based upon faculty or staff imbalance. (18a).

The United States District Court found that the Board's policy toward establishing attendance zones was non-discriminatory and designed to achieve maximum integration and was not established with any intent to maintain the operation of a dual school system(21a).

There was no claim nor was it found that there was any state action designed to impede desegration within the Louisville Independent School District (28a).

The respondents were and have been at all times material represented by Hon. Robert Sedler. In his opening statement to the District Court he said, "We are not contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the Court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of the Black schools is substantially the same as the quality of

the White schools and that the same kind of program is offered". (3a).

There was not one word of evidence offered or one bit of testimony adduced to the effect that petitioners did not immediately convert the school system to a unitary one or that they have not done all within their power since *Brown I* to maintain it as a unitary system. No claim of invidious discrimination was made. No bad motive was shown. No testimony was given from which an inference of any intent to thwart the holding of *Brown I* could be drawn. Respondents' entire case was bottomed upon the proposition that because the Board of Education of Louisville, Kentucky, was lawfully segregated at the time of the decision of *Brown I* and that because schools within its district were racially imbalanced that this equaled "vestiges of a dual school system."

After the trial in the District Court, the plaintiffs appealed the Judgment of the District Court to the United States Court of Appeals for the Sixth Circuit, and on December 28, 1973, the Sixth Circuit reversed the District Court and held that the Louisville Independent School District had not desegregated and that the boundary line between the Louisville District and the Jefferson County school district would present no barrier to a county-wide desegregation plan. *Newburg A. Coun., Inc.* v. *Board of Ed., Jefferson Cty., Ky.*, 489 F.2d 925 (CA 6, 1973).

Louisville and Jefferson County both petitioned this Court by certiorari and on July 25, 1974, this Court entered the following order:

"BD. OF EDUCATION OF JEFFERSON COUNTY, KY., ET AL. V. NEWBURG AREA COUNCIL, INC., ET AL., 73-1430; BD. OF EDUCATION OF LOUISVILLE, KY., ET AL. V. HAYCRAFT, ET AL., 73-1431; BD. OF EDUCATION OF ANCHORAGE, KY., ET AL., V. HAYCRAFT, ET AL., 73-1445.

The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Milliken vs. Bradley, ___ U.S. ___ (1974). Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice White and Mr. Justice Marshall would grant certiorari and without briefing or oral argument affirm the judgments."

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE SUBSTANTIAL QUESTION OF WHETHER A SCHOOL DISTRICT, LAWFULLY SEGREGATED AT THE TIME OF *BROWN I.* WHICH THEN CONVERTED TO A UNITARY SYSTEM, AND THEN BECAUSE OF FACTORS BEYOND ITS CONTROL AND WHICH IT WAS POWERLESS TO REMEDY BECAME RACIALLY IMBALANCED, IS GUILTY OF DE JURE SEGREGATION, WHERE THERE IS NO EVIDENCE OF ANY DISCRIMINATORY ACTION BY THE SCHOOL BOARD.

After a protracted trial in the District Court, Judge Gordon found that Louisville had desegregated and had, since desegregation, operated a unitary school system. The trial court heard all of the witnesses and had the benefit of over 130 exhibits. Among other things, the Court observed:

"We cannot help but observe that, if every other school district in America had attacked the problem in such a straight forward and progressive manner, there might not now be the great plethora of federal decisions existing on the problem, with almost 700 school districts in America yet under federal court orders." (App. 31b)

and

"We have examined and viewed the evidence in this entire matter 'from its four corners.'

No one can seriously dispute that the Louisville Independent School District moved with dispatch and diligence to integrate its schools and faculty following *Brown I*, as evidenced by what in fact did occur, as hereinabove, factually found by us.

Likewise, no one can seriously dispute that during the ensuing years, particularly since 1965, regrettable racial imbalance did indeed begin its catena; however, such imbalance did not germinate from, nor has it proliferated from, any acts or failures to act by school or state authorities. The proliferation has been the result, in spite of efforts of resistance by the defendant Board, of white flight, neighborhood housing patterns and socioeconomic factors; not dejure acts of failures to act." (App. 57b)

The Court found (1) That Louisville had complied with the rules and regulations of all federal agencies, absent, Louisville could not have secured the large amount of federal funding for its programs, (App. 38b) and (2) That the tip ratio or flight of the white theory had proved out and was applicable to Louisville, and he acknowledged the position that complete desegregation

would result only if some or all of the Jefferson County District was made part of Louisville (App. 39b), (3) That the student assignment plan did *not* contribute to racial imbalance that existed in some of the Louisville schools (App. 40b), (4) That the Louisville school closing policy was non discriminatory and seemed to have been designed to achieve maximum integration (App. 41b), (5) That there was no vestige of a dual school system based upon the proposition of racial imbalance among the faculty (App. 42b), (6) That the attendance zones were established on a non discriminatory basis and not for purpose of invidious discrimination (App. 51b), and (7) There was no state action which contributed to the perpetration of a dual school system or impeded desegregation (App. 55b).

In Detroit, Page 21, it is said:

> "In *Swann*, which arose in the context of a single independent school district the court held:
>
> > 'If we were to read the holding of the District Court to require as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.' 402 U.S., at 24.
>
> The clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.'[19] See *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)."
>
> "[19] Disparity in the racial composition of pupils within a single district may well constitute a 'signal'

> to a district court at the outset, leading to inquiry into the causes accounting for a pronounced racial identifiability of schools within one school system. In *Swann*, for example, we were dealing with a large but single independent school system and a unanimous Court noted: 'Where the proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory.' *Id.*, p. 26. See also *Keyes*, supra, 413 U.S. at 208. However, the use of significant racial imbalance in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy. *Keyes, supra*, also involved a remedial order within a single autonomous school district."

Again, we say that imbalance, even significant imbalance, does not equal a constitutional violation calling for a remedy. Since Louisville desegregated, every school within the system, at one time or another, has had a black child in attendance, except one, and this proves conclusively and beyond cavil that there has been no discrimination since Louisville desegregated after the decision in *Brown I*. Exhibits 1 through 70 demonstrate the racial composition of every school within the Louisville System from 1956 through 1972. These exhibits show, for example, that Shawnee High School, a pre-Brown white school, had approximately 50 blacks and 850 whites in 1956, and the reverse is true in 1972. The same is true for Parkland. The exhibits men-

tioned are photographs of each school and on the back is shown the pupil ratio, the staff ratio, an assessment of the condition of the school and the per pupil cost of educating the children in the school. Without belaboring the point, we would show that Ahrens Trade High School, in 1956, had 1% black, and in 1972 30% black. (Exh. 61 and 61a). In 1956, Atherton had 0% black and in 1972 3% and in 1971 4% black (Exh. 62 and 62a). Regrettably, Central High School, from 1956 to 1972, has had only 2 white children. Its staff, however, went from 0% white in 1959 to 43% white in 1972 (Exh. 63 and 63a). Iroquois Senior High School opened in 1965 (not new construction) located in the south end of a predominantly white neighborhood started off with 2 black students in 1965 and 23 black students in 1967, and 16 black students in 1972 (Exh. 64 and 64a). Male High School went from 5% black in 1956 to 97% black in 1972. In 1965 47% of its students were black and in 1966 55% of its students were black. Its staff went from 0% black in 1959 to 41% black in 1972 (Exh. 65 and 65a). Manual Senior High School went from 2% black in 1956 to 37% black in 1972 (Exh. 66 and 66a). Shawnee Senior went from 5% black in 1956 to 95% black in 1972 (Exh. 67 and 67a). In 1965 4% of its pupils were black and in 1966 53% were black. Its staff went from 0% black in 1959 to 51% black in 1972.

Barrett Junior High School, located in the east end and in a predominantly white neighborhood went from 3% black in 1956 to 7% black in 1972 (Exh. 48 and 48a). DuValle Junior High School in the west end had 20 white children in 1959 and only 4 white children in 1972. Its staff in 1972 was composed of 16 whites and 26 blacks

(Exh. 49 and 49a). Gottschalk Junior High, located in the south end went from 1% black in 1956 to 3% black in 1972. 29 black children attended Gottschalk in 1972 (Exh. 50 and 50a). Highland Junior High School located in the east end, a pre-Brown white school went from 1% black in 1956 to 11% black in 1967 to 7% black in 1972. In 1969, 107 black students attended Highland (Exh. 51 and 51a). Manly Junior located in the central part of Louisville, came from 28% black in 1956 to 64% black in 1972. In 1965, there were 553 children in Manly and 502 black children. The staff ratio came from 4% black in 1959 to 49% black in 1972 (Exh. 52 and 52a). Manual Junior High School located in the central area of the city came from 14% black in 1956 to 44% black in 1972. Its student ratio thus fairly well matches the ratio of the district (Exh. 53 and 53a). Meyzeek Junior High School, located in the inner city, a pre-Brown black school had 24 whites and 391 blacks in 1966, and in 1972 had 1 white and 336 blacks. Its staff ratio came from 100% black down to 55% black in 1972 (13 whites and 16 blacks) (Exh. 54 and 54a). Parkland Junior High, a pre-Brown white school had 4% black in 1956, 46% black in 1963 and 98% black in 1972. 26 white children were attending Parkland in 1972 and its staff went from 0% black in 1959 to 48% black in 1972 (Exh. 55 and 55a). Russell Junior High, a pre-Brown black school has a very limited future because of its condition, has had 4 white children in it since 1956. Presently 15 of its staff members are white and 27 are black (Exh. 56 and 56a). Shawnee Junior High, a pre-Brown white school has run the course from 3% black in 1956 to 95% black in 1972. In 1964, 47% of the students were black and 53% white.

Its staff came from 0% black in 1959 to 56% black in 1972 (Exh. 57 and 57a). Southern Junior High has only had 19 black students in it since 1956. This school is located in the south end and in a predominantly white neighborhood (Exh. 58 and 58a). Western Junior High School, which is located in the west end, had 20% black in 1956 and 25% black in 1972. It is interesting to note that black population reduced from 233 in 1956 to 67 in 1960, and then increased to 319 in 1972. Its black staff came from 4% in 1959 to 32% in 1972 (Exh. 59 and 59a). Woerner Junior High School, located in the east end was opened in 1963 with 22% black population, which has increased to 41% in 1972. In 1972, 495 white students attended Woerner and 345 black children attended Woerner. Its staff came from 0% black in 1964 to 39% black in 1972 (Exh. 60 and 60a).

Atkinson Elementary, a pre-Brown white school had 5% black in 1956, 9% in 1969 and 7% in 1972 (Exh. 1 and 1a). Beechmont Elementary, a small south end school, has only had 3 blacks attending since 1956, that being 2 in 1971 and 1 in 1972. 31% of its faculty is black (Exh. 2 and 2a). Belknap Elementary, a pre-Brown white school located in the east end has had at least one black child in it since 1956, and as many as 8 in 1966 and 3 in 1972. 18% of the faculty is black. Belknap is located rather near Atherton High School (Exh. 3 and 3a). Bloom Elementary, a pre-Brown white school, located in the east end had a total of 19 black children in it since 1966 and 32% of its faculty is black (Exh. 4 and 4a). Brandeis Elementary , a pre-Brown white school, has come from 14% black in 1956 to 99% black in 1972, with 46% of its student population being black in 1960. Its faculty has

ranged from 0% black in 1959 to 55% black in 1968 to 63% black in 1972 (Exh. 5 and 5a). Breckinridge Elementary, opened in 1966, started off with 21% black and had 16% black in 1972, with 31% of its faculty being black in 1972 (Exh. 6 and 6a). Byck Elementary, opened in 1961, started off with 6% of its students being white and 94% being black, and it is now 98% black in 1972, however, 48% of its faculty was white in 1972 (Exh. 7 and 7a). Carmichael Elementary opened in 1961, with a student ratio being 50% black and 50% white and in 1972, was 84% black and 16% white. 47% of its faculty members are black (Exh. 8 and 8a). Carter Elementary located in the far west end of Louisville, a pre-Brown black school and located in a predominantly black neighborhood, had had a total of 67 white children attend since 1956 (Exh. 9 and 9a). Clark Elementary located in the east end of Louisville started in 1956 with 11% black and has 11% black in 1972 (Exh. 10 and 10a). Cochran Elementary, located at 2nd and Hill in the central part of the city near Manual, started in 1956 with 3% black, went to 10% black in 1968 and to 8% black in 1972 (Exh. 11 and 11a). Coleridge-Taylor Elementary located near Central High School, a pre-Brown black school started with 19 white children in 1956, went to 54 white children in 1965 to 6 white children in 1972. The ratio has ranged from 99% to 89% over the years. 55% of its faculty was black in 1972 (Exh. 12 and 12a). Dolfinger Elementary, a pre-Brown white school started with 8% black and in 1972 had 6% black and in 1967 had 13% black (Exh. 14 and 14a). Emerson Elementary, a pre-Brown white school, started with 4% black in 1956, went from 41% black in 1964 to 14% in 1972 (Exh. 15 and

15a). Englehard Elementary, a pre-Brown white school, went from 3% black in 1956 to 21% black in 1972 (Exh. 16 and 16a). Field Elementary located in the eastern-most part of Louisville and a predominantly white neighborhood has had a total of 17 black children attend from 1956 to 1972, has a black principal and 32% of its staff is black (Exh. 17 and 17a). Foster Elementary, a pre-Brown white school, started in 1956 with 13% black, went to 45% black in 1958 and only 2 white children attended in 1972. Its faculty is 40% white (Exh. 18 and 18a). Franklin Elementary, a pre-Brown white school started with 14% black and had 5% black in 1972 (Exh. 19 and 19a). Frayser Elementary, a pre-Brown white school, started with 4% black children in 1956 and 6% black children in 1972 (Exh. 20 and 20a). Hazelwood Elementary, a pre-Brown white school started out with 2% black in 1965 and now has 8% black (Exh. 21 and 21a). Heywood Elementary, a pre-Brown white school, started in 1965 with 17% black and now has 12% black (Exh. 22 and 22a). Jacob Elementary, a pre-Brown white school in the south end started at 0% black and went to 4% black in 1967 and now has 3% black (Exh. 23 and 23a). Johnston Elementary, a pre-Brown white school started with 8% black and now has 7% black (Exh. 24 and 24a). Jones Elementary, a pre-Brown white school, started with 9% black and went to 40% black in 1967 and now has 25% black (Exh. 25 and 25a). Kennedy Elementary, a west end black school opened in 1963, and has always had from 1 to 2% white children in attendance and 40% of its faculty is white (Exh. 26 and 26a). Martin Luther King, opened in 1968, had 22% white children and in 1972 only 2% were white, although 62% of its faculty is white (Exh. 27 and 27a). Lincoln

Elementary had 32% black in 1972 (Exh. 28 and 28a). Longfellow Elementary located in the east end of Louisville is the only school in the Louisville system who has never had a black child in attendance. 22% of its faculty is black (Exh. 29 and 29a). Lowell Elementary located in the south end of Louisville in what is known as the Highland Park area, a pre-Brown white school, started with 9% black in 1956 and in 1972 had 12% black (Exh. 30 and 30a). Marshall Elementary, an inner city school and a pre-Brown white school, started with 23% black in 1956 and had 53% in 1972 (Exh. 31 and 31a). McFerran Elementary, a pre-Brown white school started out with 0% black. It is now 88% black, however, in 1967, it had 564 white children and 408 black children (Exh. 32 and 32a). Parkland Elementary, a pre-Brown white school started with 18% black, was almost 50-50 in 1960 and had 3 white children in it in 1972 (Exh. 33 and 33a). Perry Elementary, a pre-Brown black school has only had 51 white children attend since 1956, although, in 1972 39% of its staff was white. (Exh. 34 and 34a). Portland Elementary has come from 1% black in 1956 to 8% black in 1972 (Exh. 35 and 35a). Roosevelt Elementary, a pre-Brown white school, went from 2% black in 1956 to 56% black in 1972 (Exh. 36 and 36a). Rutherford Elementary, a pre-Brown white school in the south end and in a predominantly white neighborhood, had 9 black children attending in 1972 (Exh. 37 and 37a). Semple Elementary, a pre-Brown white school in the south end and in a predominantly white neighborhood, has only had 15 black children attend since 1956 (Exh. 38 and 38a). Shawnee Elementary, a pre-Brown white school has come from 0% black in 1956 to 89% black in

1972, although in 1956, 621 whites attended and 430 blacks attended and in 1972, 50% of its faculty was white (Exh. 39 and 39a).

All of the foregoing is demonstrated by the exhibits. While this information may be onerous, its relevance is to demonstrate that all racial barriers in Louisville were and are eliminated. We see graphically the change of a school population of 0% black to 100% black, but we also see this matched identically with demographic exhibits which show where people lived during these years. If a neighborhood was 50% black and 50% white, the school was almost identically populated.

What we ask, could Louisville have done to prevent this? The student assignment plan as the evidence shows has made absolutely no difference insofar as the racial ratio of the schools is concerned. Its elimination would have only prohibited 4000 children from attending the school of their choice. Suppose the district was composed of 999 white children and 1 black child. Surely the one black child would be racially isolated, but could this district be considered to be a dual school system? Now, if this black child was required to go to school by himself and in a separate school only for him the answer would be undoubtedly yes; absent, however, this ridiculous fact situation, the answer would be no. This is what we believe this Court meant when it used the language it did in both Swann and Detroit. It is not, we contend, the number of black or white children or percentage of black or white children in a particular school, but whether or not there is any policy or concerted effort to prevent any child attending any school within the district because of race.

Thus, we contend it serves no purpose and is, in fact, somewhat misleading to use terms like "racially identifiable schools". A subjective test of how a school appears to a particular person cannot be determinative of the constitutional issues.

People have great mobility these days. Louisville has a strong open-housing law. We submit, however, there is no way that the Board of Education of Louisville, Kentucky can physically change the housing patterns which it did not create so as to achieve some reasonable mathematical ratio of black and white in a particular school.

Dr. Walker expressed some optimism about holding the situation in Louisville (Transcript of Evidence, Vol. II, pp. 161, 162, 163, and 164). The essence of his testimony was that because of the change in attitudes that the Louisville staff had been able to generate, it was more likely that lasting desegregation would result than from a cross-transportation situation in Louisville alone.

Thus, we contend that Judge Gordon's original opinion and judgment was correct. There was ample evidence to support his findings, and accordingly, his judgment should be reinstated.

According to the Supreme Court's opinion in *Milliken* v. *Bradley*, ___ U.S. ___, July 25, 1974, two things must exist before a Federal Court, in exercising its equitable remedial powers can order an interdistrict remedy. The first is that the boundary line between the two districts was established with a purpose of isolating black children from white children, or for some racial motive. The line separating the Louisville District and the Jefferson County District was established for no such purpose. No racial motives were present.

Chapter 160 of the Kentucky Revised Statutes provides:

> "Each county in this state constitutes a county school district, except that in counties in which there are independent school districts."

The statute establishing these boundary lines was adopted in 1934 (Chapter 56, Ky. Acts, 1934). This statute was construed by the Court of Appeals in *Thomas* v. *Spragens*, 308 Ky. 97, 213 S.W.2d 452 (1948). The significant holding in *Thomas*, however, was that the boundaries of an independent school district did not expand with the boundaries of the city by which it was embraced. Thus, the territorial limits of the Louisville Independent School District are less than the territorial limits of the City of Louisville.

The second requirement seems to be that Jefferson County must have done something to contribute to the racial imbalance within Louisville or either Louisville did something to cause the racial imbalance within the Jefferson County School District. Surely, and it cannot be denied, as Louisville's desegregation efforts escalated, white people did indeed move into the Jefferson County School district where there were practically no black children in residence or in attendance. We do not believe, however, that any black families moved into Louisville for a corresponding reason. Apparently, some black families have settled within the Jefferson County District, otherwise, it would not have almost 4000 black children attending its public schools. We do not believe that any argument to the effect that Jefferson County was a haven for white flight meets the test in *Milliken* or any legal test, because the same could be said about

three predominantly white districts directly across the river in Indiana, and people cannot be made to stay or leave. This is not a case where the state gerrymandered districts out of an existing district in order to isolate black children from white children, *Scotland Neck, supra.*

Plaintiffs seek some solace from the language in this Court's opinion that before *Brown I,* and because there was no black high school within the Jefferson County School District, black students were admitted to Louisville Central High School with the Jefferson County School District paying their tuition. This was pursuant to KRS 159.010, a statute that was in effect long before *Brown I* and had no relation to race. Often times where county areas outside an independent school district were sparsely settled, a county school district would pay the tuition for its children, both black and white, to attend school within the independent district because those schools were better and often times the county school district would lack similar facilities. Nevertheless, the Court covered this point under facts far more aggravated than presented here on pages 29 and 30 of its majority opinion. This was held insufficient to impose an inter-district remedy:

> "(2) There was evidence introduced at trial that, during the late 1950's, Carver School District, a predominantly Negro suburban district, contracted to have Negro high school students sent to a predominantly Negro school in Detroit. At the time, Carver was an independent school district that had no high school, because according to the trial evidence, 'Carver District . . . did not have a place for adequate high school facilities.' Pet. App., at

138a. Accordingly, arrangements were made with Northern High School in the abutting Detroit School District so that the Carver high school students could obtain a secondary school education. In 1960 the Oak Park School District, a predominantly White suburban district, annexed the predominantly Negro Carver School District, through the initiative of local officials, *Ibid.* There is, of course, no claim that the 1960 annexation had segregatory purpose or result or that Oak Park now maintains a dual system.

[19]According to the Court of Appeals, the arrangement during the late 1950's which allowed Carver students to be educated within the Detroit District was dependent upon the 'tacit or express' approval of the State Board of Education and was the result of the refusal of the White suburban districts to accept the Carver students. Although there is nothing in the record supporting the Court of Appeals supposition that suburban White schools refused to accept the Carver students, it appears that this situation, whether with or without the State's consent, may have had a segregatory effect on the school populations of the two districts involved. However, since 'the nature of the violation determines the scope of the remedy,' 402 U.S., at 15-16, this isolated instance affecting two of the school districts would not justify the broad metropolitan-wide remedy contemplated by the District Court and approved by the Court of Appeals, particularly since it embraced potentially 52 districts having no responsibility for the arrangement and involved 503,000 pupils in addition to Detroit's 276,000 students."

The situation in *Milliken* was far more aggravated because there were white schools available where the

black children could have attended and this was not true in the Louisville and Jefferson County situation.

If the facts of this case compel a holding, as we believe it does, that racial imbalance in Louisville schools cannot be eliminated, via an order directed to Louisville alone, then we must respectfully request that this Court reinstate the District Court's judgment which held that Louisville had done all it could do to desegregate and that further efforts would have a reverse effect.

Thereafter the case was rebriefed and reargued before the Sixth Circuit and on December 11, 1974, the Sixth Circuit reaffirmed its original position and remanded the case to the District Court for the forming of an implementation of a desegregation plan. The Sixth Circuit held that there was nothing in this Court's order, or in *Milliken* v. *Bradley* which would cause them to reconsider the issue of whether or not Louisville or Jefferson were operating a unitary or dual school system.

The raging issue at the time *Milliken* v. *Bradley* was decided and at the time Louisville and Jefferson petitioned this Court for certiorari originally was whether or not a United States District Court in the exercise of its equitable and remedial powers could cross school district boundary lines in establishing a plan for desegregation. Louisville, in its petition to the Court, did not question that power and does not question it now, although we think a District Court's power in this regard was severely limited by *Milliken* v. *Bradley*.

Louisville's position throughout this litigation has been:

(1) If Louisville is indeed segregated, then a desegregation order directed to Louisville alone would be counter-productive and result in more segregation because of white flight.

(2) That if a desegration order should result in this case, it should be imposed on a county-wide basis with the burden falling equally as possible and practicable on all.

We think it is extremely important and in accord with this Court's wishes that we advise that on February 28, 1975, the State Board of Education for the Commonwealth of Kentucky ordered, pursuant to Louisville's petition, that Louisville and Jefferson be MERGED into one school district with the effective legal date of such merger being April 1, 1975. The State Board ordered that three of the present five-members of the Louisville Board would serve on the merged Board during the early stages of merger. There is litigation pending presently in the Court of Appeals of Kentucky which will substantially bear on the merged Board's composition, and we expect a decision shortly from the Court of Appeals of Kentucky.

In the hearing on the merger question, the Board of Education of Jefferson County Kentucky objected to the merger order by the State Board and there is a real probability that the action of the State Board ordering merger may be attacked, in which event two possibilities may result. They are:

(1) That the order of the State Board of Education ordering merger would be set aside and held for naught; and,

(2) That the effective date of the merger would be substantially delayed.

Although none of this is in the record, we are stating it because we believe that an ethical duty exists on the part of Counsel to keep this Court advised of any developments which would bear on the merits of the case.

Again, it may be asked what are we about in filing this petition? First, we observe in *Milliken* v. *Bradley* that the Detroit school district did not seriously argue about the question of whether or not the Detroit district was in violation. The end result of *Milliken* v. *Bradley* imposed a desegregation order on Detroit alone which we must assert in all candor and because of white flight is doomed to failure before it starts. Second, we are aware of recent legislation enacted by Congress which would limit a District Court's power in ordering a desegregation plan to transporting children to the next nearest school. Because of the de facto racial isolation in Louisville, this simply will not work or do the job. Third, should the Board of Education of Jefferson County, Kentucky be successful in its appeal to the Court, or should its petition for certiorari be granted, had Louisville not acted, it would be in the same calamitous situation as Detroit.

Accordingly, we must, therefore, say to the Court that in the event it grants relief to Jefferson, then Louisville must have the same relief as Jefferson, and if it turns out that Jefferson is unitary, and if it turns out that the boundary lines are not eliminated because of the merger order, then Louisville must revert to its original status as found by the District Court, that being a unitary school district with the racial imbalance being a de facto and not de jure. We cannot over-emphasize or

adequately stress the critical importance of our position here. This necessitates our reviewing the original efficacy of the District Court's opinion and Judgment (1a).

CONCLUSION

This brief on the part of Louisville represents no retreat from its long held position that a forced separation of the races and the fundamental priciples of democracy cannot co-exist. It is obvious from the record in this case, as it must be in any record involving an urban school system, that the racial isolation that may exist results from economics rather than de jure acts of discrimination on the part of school authorities. This is particularly true in the case here. The militant question now, as it has always been, is whether or not a Federal Court in the exercise of its equitable remedial powers, keeping in mind that a Federal Court is a court of limited jurisdiction, can restructure state-created political institutions in order to alleviate or correct a social ill.

This Court and "experienced observers and colunists" have said that Detroit does not mean a retreat from *Brown I*. Regrettably, we have a contrary opinion. The end result of Detroit whereby this Court urged expediency in fashioning a remedy for Detroit alone is unassailable proof of the dissipation of *Brown I*. Nevertheless, we are all taught that what the Court says in a given case is the law of the land.

It has been said that the causes of inner city problems and the reasons for poverty-stricken blacks living in inner cities are simply not known. Again, we

disagree. The reasons are again apparent. Poverty is the cause. Educational experts say with a high degree of credibility that achievement in school is directly related and parallel to the economic status of the family from which the child comes. This is as true in Louisille as it is in other poverty-stricken inner city school system. There is a cultural lag and a lack of motivation from a poverty-stricken family. Of course, there are exceptions, but the exceptions prove the rule. Thus, poor people, the majority of whom are black, are locked in not from discriminatory acts on the part of the school authorities, but because of their economic level. A desegregation remedy toward Louisville alone will not cure this situation but in our opinion would aggravate it. Perhaps it should be a constitutional right not to be poor but we do not know of one. Open housing laws sound good, but even those laws, and Louisville has one of the strongest, have not resulted in a hegira of blacks from the inner city to the suburbs. Again, poverty is the reason.

The point of all this and maybe the point of Detroit is that a school desegregation remedy cannot constitutionally be employed to remedy the evils of society not amounting to a constitutional violation.

Louisville, through a progressive board led by an innovative superintendent has attacked the problem. Significantly and almost miraculously Louisville's elementary poverty level children in the lower grades are now reading on the national level. Its staff attitudes and blitz programs have resulted in fewer drop-outs and fewer delinquency referrals. It is not claimed that these programs and these achievements are going to correct problems of racial isolation and poverty, but changes are occurring and these changes are good.

The Louisville School Board has adopted a program and policy of sharing its decision-making power with neighborhood school boards meaning that over 50 of Louisville's schools have a separate board for each school composed of patrons and educators from the school. These boards participate in staff selection, programs and even are allowed input as to how the money allocated to a particular school should be spent. This has not resulted in any derogation of the elected board's powers. Quite to the contrary these boards have been viable and their decisions responsible. Much of the hostility that people previously held toward a particular school has been eliminated.

Because we believe Detroit has emasculated any possibility of an interdistrict solution or forced merger here by a Federal Court, Louisville again must request this Court to (1) Hold it to be a unitary district and reinstate Judge Gordon's opinion and judgment of March 8, 1973 and (2) If there is a disagreement about this, then an interdistrict remedy or countywide remedy must be ordered.

Respectfully submitted,

HENRY A. TRIPLETT
HOGAN, TAYLOR, DENZER
& BENNETT
231 South Fifth St., Third Floor
Louisville, Kentucky 40202

MEMORANDUM OPINION AND JUDGMENT

This action filed June 22, 1972, was tried to the Court on December 1-7, 1972. The Court has considered the voluminous testimony, the more than 130 exhibits, which were filed by agreement into the record, and upon the entire record herein now issues its Findings of Fact and Conclusions of Law and judgment herein.

POSTURE OF THE LITIGATION

This is a school desegregation action[1] commenced by John E. Haycraft and Hazel K. Lane against the Board of Education of Louisville, Kentucky, the Board of Education of Jefferson County, Kentucky, and their respective superintendents, seeking desegregation of the Louisville School District and demanding that the Court transfer so much of the Jefferson County School District as lies within the corporate limits of the City of Louisville into the Louisville School District.

By intervening complaint, Lyman Johnson, Richard Miller, Barbara Byrd, Aaron Howard, John R. Hughes, Teresa Black, John Schmidt and Earl Alluisi sue the Jefferson County Board of Education, the Board of Education of Louisville, the Anchorage, Kentucky Board of Education, and their respective superintendents, demanding complete desegregation of the three said school districts, and further that the Court order a merger of the three districts.[2]

A second intervening complaint was filed, sponsored by the American Federation of Teachers, a labor organization which claims it represents some of the

[1] Sponsored by the Kentucky Civil Liberties Union.

[2] Sponsored by the Human Relations Commission and the NAACP.

teachers in all systems, demanding that the Court not arbitrarily assign teachers merely to achieve a balanced faculty.

Prior to the trial hereof, we entered certain threshold orders, to the effect that this Court lacked the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, as to the status of each of the Louisville Independent School District and the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradely* v. *School Board of the City of Richmond*, 462 F.2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit had not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was so *invidious* and dejure and further wherein the district court might be so "*locked in*" by existing political boundaries that its desegregation problem became *insusceptible of any*

solution other than by the crossing of political boundary lines that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Forth Circuit rule. We believe our judgment in this regard was vindicated, for on trial date, in his opening statement, renowned counsel for the plaintiffs stated:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours).

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Additionally, it should be noted that there was simultaneously pending on our docket, and is disposed of by another of our Opinions this very day, Civil Action

No. 7045, styled Newburg Area Council v. Board of Education of Jefferson County, and Louisville Independent School District. We tried both the instant Civil Action and Action No. 7045, one immediately following the other; first, all plaintiffs against the Louisville District and then all plaintiffs against Jefferson County Board of Education. This seemed the orderly way to handle the matter.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecessary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradley, et al.* v. *Milliken, Governor, et al*, 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development of the entire factual story, we have properly met our duty whichever way the ball bounces.

This memorandum opinion and judgment relates solely to the claims against the Board of Education of Louisville, Kentucky and its superintendent.

ISSUES AND CONTENTIONS

Contrary to many similar actions which have reached the federal courts, the issues in this case are somewhat narrow.

Plaintiffs, in their opening remarks to the Court, admitted that *no* child, black or white, within the Louisville Independent School District was being denied an equal educational opportunity or was being required to attend a substandard facility. Thus, plaintiffs' case admittedly is bottomed on the proposition that because racial imbalance exists in some of Louisville's schools that this equals "vestiges of a dual school system" which is required to be dismantled under *Brown I, Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, (1971).

Defendants contend, on the other hand, that *Brown I*, supra, though establishing segregation as being a deprivation of equal educational opportunity in violation of the Equal Protection Clause of the Fourteenth Amendment, did not require *every school* to reflect the racial ratio of the school district, and that Swann, supra, applied to *dejure* segregation, i.e., racial imbalance from discriminatory action, or inaction, of or by the authorities. Defendant concedes that once the plaintiffs have established racial imbalance in one or more of the schools (as established here) the burden is upon the defendant to come forward and show, to this Court's satisfaction, that the imbalance is not due to any invidiously discriminatory actions, or failures to act, by the Board or the State; that the imbalance results from factors beyond the authorities' control, though they have made very reasonable and practicable effort to maintain a unitary school system.

The contentions of the parties above-expressed, we believe to be the legal azimuth to be followed in the scope of our inquiry.

In the resolution of these contentions, we have considered testimony of the witnesses, numerous exhibits, demographic data, pupil desegregation, faculty desegregation, per pupil expenditure data, extracurricular activities, tip ratio data, whether the Louisville Board has done everything practical within its power to achieve maximum integration, whether or not a cross-transportation order would be legally required, the effect of the transfer policy, the effect of discontinuing old schools, the construction and addition of new schools, state action and the Board minutes since the commencement of the Board's desegregation efforts.

EXHIBITS

The Court has been favored in this case by the presentation of clear, easily understandable and relevant exhibits. Exhibits 1 through 75 in the record are pictures of each school within the Louisville system (elementary, junior high and senior high, special schools, etc.). On the back of each photograph there is a table showing the racial composition of such school for each school year since 1956 and a table showing the faculty ratio. Likewise indicated is the date the school was constructed, enlarged or renovated, and the amount of capital funds expended therefor. These exhibits also relate the per pupil expenditure in each school and the average expenditure throughout the system.

Exhibits 81, 82, 83, and 84 attached hereto are census track maps reflecting the population and housing patterns within the Louisville Independent School District since 1950. These maps dramatically demonstrate the movement of the black population from the central part of the Louisville

District to the west end during the period 1950-1970. That portion reflected on each map in the color green indicates that 76 to 100% of the area so colored was populated by black people at the time reflected. Exhibits 85, 86, 87, and 88 are 1972-73 maps of the District school system showing by overlay elementary, junior high and senior high school sites and attendance zones, excluding Ahrens Trade High School and the new vocational center both of which are district-wide for attendance.

Exhibit 90, in the record, contains certified copies of the minutes of the Board of Education of Louisville, Kentucky from 1956 to the present relating to its desegregation efforts and include annual desegregation reports. In the record is also found Exhibit 91, a current letter from the Department of Health, Education and Welfare which denied the Louisville system a grant because of its *unitary* status; Exhibit 92, a discussion of the Havighurst data relating to tip ratio, and Exhibits 93 through 123, applying to tip ratio data by graph at several schools which have shown racial shifts and applying the tip ratio theory system-wide. Also, Exhibits 124 and 125 describing the federally supported projects and programs in the Louisville Public Schools, and Exhibit 126, a film which shows Dr. Carmichael on a nationwide program called "Face the Nation" in September of 1956.

HISTORICAL FACTS

Before May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka ("Brown I")*, 347 U.S. 483, schools within the Louisville Independent School District were lawfully segregated. Thereafter, and at the commencement of the 1956-57 school year, the Louisville Independent District put into operation its school desegregation plan. That plan was a geographic

zone plan with a transfer provision. Before the first year the plan commenced, parents were sent forms which requested that the first, second and third choice of a school be indicated. In the absence of such a parental transfer request, children *were required* to attend schools within their assigned district or zone. Most of the requests were honored, although less than 3,000 were made. No similar form was sent after the 1956-57 school year, and each transfer since has been on an individual basis, with burden on the individual child or parent, with *bias* not a recognized supporting reason, to establish justification for such.

A great deal of community preparation had been achieved by the Louisville Board and its then superintendent, Dr. Omar Carmichael. The desegregation plan went into effect smoothly and with no major racial incidents. Community leaders, both black and white, participated in these efforts and the Louisville School District plan was heralded throughout the United States as a model of compliance with *Brown I*.Dr. Carmichael was personally commended by President Eisenhower and his advice and counsel in this area was sought by other school districts throughout the country. Evidence on this point was produced at the trial and an account is found in a book, "The Louisville Story", which is attached to answers to the interrogatories and is a part of the evidence in this case. We cannot help but observe that, if every other school district in America had attacked the problem in such a straight forward and progressive manner, there might not now be the great plethora of federal decisions existing on the problem, with almost 700 school districts in America yet under federal court orders.

The Louisville School District's faculty desegregation plan came into effect in 1959. Dr. Carmichael was succeeded as superintendent by Mr. Samuel V. Noe,

who served until 1969, at which time Dr. Newman Walker became the present superintendent of the Louisville District system. During Mr. Noe's tenure, 81% of all new teachers employed were black, and since the beginning of Dr. Walker's tenure, a self-imposed four-year plan has been in effect with its ultimate goal being not less than 35% of any one race being assigned to any one particular school faculty.

Since the commencement of the pupil desegregation plan, all but one of the schools within the Louisville Independent School District has had at some time or during any one school year a biracial student population.

GENERAL FACTS

The defendant Board of Education of Louisville, Kentucky is a body corporate, organized and existing under the laws of the Commonwealth of Kentucky (KRS 160.160). It is situated within the City of Louisville, a city of the first-class within Jefferson County, Kentucky. It manages and controls all of the public elementary, junior high and high schools within a geographical area known as the Louisville Independent School District. Its boundaries are not coterminous with the City of Louisville, Kentucky, and approximately 10,000 children live between the boundaries of the Louisville Independent District and the outer boundaries of the City of Louisville, Kentucky and attend the Jefferson County school system. Under Kentucky law, an independent school district's boundaries do not expand with the boundaries of the city by which it is embraced. (*Spragens* v. *Thomas*, 308 Ky. 97, 213 S.W.2d 452.)

The school district is composed of four roughly identifiable areas known as the east end, central area, west end, and the south end. The south and east end are mostly populated by the white population while the

west end is largely populated by the black population with a mixture of both in the central area. (See Exhibit 85). Formerly, the black population resided in the central area of the city, but after urban renewal (late 1950's and early 1960's) a large majority of the black population moved to and settled in the west end of the Louisville District. (See Exhibits 81, 82, 83 and 84). Louisville did not provide transportation for students before *Brown I*[1] and does not now.

At the commencement of the 1972-73 school year, the Louisville Board operated some 75 schools. The grade structure runs from kindergarten (kindergarten is not included in data) to grade twelve. There are nine high schools, two of which are vocational schools and one of which is a residential manpower center located at the old Lincoln Institute in Shelby County, Kentucky. There are thirteen junior high schools and forty-seven elementary schools. In addition, there is a three-level school located at the Brown Education Center at Fourth and Broadway designed for those children who showed some penchant toward excelling in creativity. This latter school, opened at the start of the 1972-73 school year, draws children from throughout the district.

As to the high schools (See Exhibit 88), Atherton, Iroquois and Shawnee are located in separate attendance zones; Male, Manual and Central are located in a common attendance zone (they being in closer proximity to one another; Ahrens (the new vocational school) and the Brown Education Center School have district-wide attendance zones. All of the junior high schools and all of the elementary schools have separate attendance zones and districts. (See Exhibits 86 and 87).

The total enrollment in the Louisville Independent District at the commencement of the 1972-73 school year

[1] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

was 45,570. White students constituted 22,637 of that total and black students 22,933. During the 1956-57 school year, there were 45,841 children enrolled, of which 12,010 were black and 33,831 were white. Thus, from 1956 to the present time, the white enrollment has decreased by approximately 11,000 pupils, and the black enrollment has increased by the same number. From 1956, the total school population increased from 45,841 until it peaked in 1967 at 51,262; thereafter, it began to decline until it reached the present population of 45,570.

Although black children constitute just over 50% of the total enrollment in the Louisville School District, the total citizen population of the District is approximately 23% black and 77% white. Over forty per cent of the children in the District system come from poverty level families with most of these (80%) being black.

The Louisville system has approximately 2,200 faculty members of whom 36% are black. Forty per cent of the system's central administrative staff is black.

The Louisville Board itself is composed of *three whites* and *two blacks*, all of whom *are elected at large* from within the Louisville Independent School District, a district in which white citizens outnumber black citizens 3 to 1; a strong indication to us of no manifest racial prejudice against blacks playing a viable role in the operation of the District School System. There has been black representation on the Louisville School Board since 1959[4]. An examination by us of the School Board minutes does not reflect any racial disharmony or polarization among the members of the Board.

[4]Since the election of Hon. Woodford Porter in 1959, he being subsequently relected and serving as Chairman of the Board 2 years and 7 months during his terms of office.

ACTIONS OF FEDERAL AGENCIES

Two federal agencies have been primarily concerned with enforcing the mandate of *Brown I*, supra. They are the Department of Justice and the Department of Health, Education and Welfare (HEW). Since the 1964 amendment to the Civil Rights Act, HEW, through its Civil Rights Division, has had the primary responsibility for monitoring the desegregation efforts of school districts throughout the United States. When HEW determines that there is invidious discrmination on the part of a school district or that a school district is operating a dual system, it may refer such to the Department of Justice which then proceeds on behalf of the United States against the school district involved. The Justice Department has not participated in this litigation, nor has the United States ever filed a suit against the Louisville School Board or District claiming it to not be desegregated or possessing vestiges of a dual school system.

In addition to the above, HEW has certain administrative powers relating to approval of federal grants. These grants cover many areas but are primarily compensatory in nature. Before HEW will approve a grant, it is required to find that the receiving system is unitary. HEW explores areas such as pupil assignment and ratio, faculty assignment ratio, facilities, program and extracurricular activities. In the event of any violation, HEW is empowered to take administrative steps to remove a school district from the list of those districts eligible to receive federal grants or to require a plan for desegregation.

All school districts since the Amendment of 1964 have been required to achieve a "441 status", meaning that the district is recognized by HEW as operating a unitary system. The Louisville District achieved "441

status" after investigation in 1965 and has held such ever since.

Pursuant to a 1968 complaint filed against the Louisville District by the NAACP, a team of HEW investigators came to Louisville to survey the situation and after a lengthy and searching examination, which included studies of ways in which the Louisville District might achieve greater racial balance in its schools by pairing, magnet plans, etc., the HEW team left and has never returned, nor has HEW since given the Louisville District any mandate, or advice, or direction as to how it might achieve a greater racial balance than that existant.

After *Swann*, supra, in 1971, Mr. Stanley Pottinger, Chief of the Civil Rights Division of HEW, called Dr. Newman Walker, Superintendent of the Louisville system, and requested that representatives of the Louisville Board come to Washington and informally discuss the system's situation. This request was honored and the then Chairman of the Board, Mr. Carl Hines, Dr. Walker, Dr. Yeager, Chairman of School Operations, and the Board's attorney visited Mr. Pottinger, reviewed the Louisville District situation completely, supplied current data, both demographic and otherwise, and requested that the Louisville Board be advised of any suggestions that HEW might have. During this meeting, the Louisville Board expressed a willingness to visit any comparable district where the flight of the whites problem had been solved by cross-transportation, and Mr. Pottinger advised that he knew of no such case. This activity took place in September of 1971, and at the time of trial HEW had not replied nor made any suggestions or given any directions.

Thus, in total we find HEW reviewed Louisville in 1965, came twice in 1969, and again reviewed Louisville's status in 1971 and 1972. No grant has ever

been disapproved or denied the Louisville School District for the reason it was not a unitary district. As late as *1972,* the Department of Health, Education and Welfare reiterated its position that the Louisville District was unitary.

In *Singleton* v. *Jackson Municipal Separate School District,* 5th Cir., 348 F.2d 729 (1965), the Court said:

> "The United States Office of Education, Department of Health, Education and Welfare, has fixed minimum standards to be used in determining the qualifications for schools applying for federal financial aid.
>
> "We attach great weight to the standards established by the Office of Education. The judiciary has of course functions and duties distinct from those of the executive department, but in carrying out a national policy the three departments of government are united by a common objective. There should be a close correlation, therefore, between the judiciary's standards in enforcing the national policy requiring desegregation of public schools and the executive department's standards in administering this policy. Absent legal questions, the United States Office of Education is better qualified than the courts and is the more appropriate federal body to weight administrative difficulties inherent in school desegregation plans. If in some district courts judicial guides for approval of a school desegregation plan are more acceptable to the community or substantially less burdensome than HEW guides, school boards may turn to the federal courts as a means of circumventing the HEW requirements for financial aid. Instead of a uniform policy relatively easy to administer, both the courts and the Office of Education would have

> to struggle with individual school systems on ad hoc basis. If judicial standards are lower than HEW standards, recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus."

Thus the Court finds that the Board of Education of Louisville, Kentucky has complied with all requirements and regulations of the Department of Health, Education and Welfare, in spirit and in fact.

THE TIP RATIO

Throughout the trial, witnesses have referred to the tip ratio theory, or the Havighurst theory confirmed by the Pettigrew data. Havighurst's studies reveal that when a school becomes 25 to 40% black, the whites begin to leave and the school population tilts and rapidly becomes predominantly black. The range of play between the 25% factor and the 40% factor relates to the prestige of the school, and whether it is populated by middle-class white families or those white families who cannot afford to move. Havighurst says that the single most important factor in the white flight is the entry of blacks into schools which had been formerly all white or were predominantly white.

The Louisville Board study in those schools which were formerly predominantly white showed that the tip occurred locally at approximately 20% rather than the low figure of 25% found by Havighurst. As clearly indicative of this occurrence, we find Parkland Junior High School (Exhibit 87), located in the west end of the city (formerly all white and now predominantly all black), and Male High School (Exhibit 88), located in the central part of the city (formerly all white, now predominantly black), and Manley Junior High School (Exhibit 87), located at Brook and Oak, in the central part of the city, and which has had for the last few years

a reasonably balanced ratio gives evidence that it, too, has tilted, and Manual Senior High School (Exhibit 88) and Junior High School (Exhibit 87), both located in the central part of the city and now showing evidence of tipping.[5]

We, therefore, find that the tip ratio theory has proven itself in the Louisville District as we regrettably believe it has elsewhere. Even plaintiffs tacitly concede that any further efforts by the Louisville School Board, beyond what the Board is now doing, to achieve greater racial balance will result in a system-wide tilt; thereby leaving the district blacker, and poorer and more segregated. Plaintiffs say that complete integration can occur only if some or all of the Jefferson County and Anchorage School Districts are made part of the Louisville District, and student transportation is undertaken.[6]

ASSIGNMENT PLAN

The student assignment plan used by the Louisville Board is described as a geographic zone plan with provisions for a transfer if there is room in the school to which the transfer is sought. This is not a warmed-over version of what the north calls "open enrollment" and the south calls "freedom of choice." Nor is it a neighborhood school plan in its entirety.

Zones are established to meet the needs of a surrounding community area as the need relates to the capacity of the school. There is no evidence in this case that the Board's student assignment plan or its method of es-

[5] Manual High School does some damage to the "racially identifiable" claim because while it has a majority of white students, the athletic teams are predominantly black, and it is, therefore, viewed by the community as a black school.

[6] Dr. Walker and Dr. Yeager would include southern Indiana as well, primarily on the theory that all escape valves, even across the Ohio into Indiana, must be shut to prevent the tilt. Surely we have no authority beyond the boundaries of the Western of Kentucky, regardless of the outcome of *Bradley* v. *Richmond*, supra, and *Bradley* v. *Milliken*, supra.

tablishing school attendance zones has contributed to the racial imbalance that exists in some of the Louisville schools. To the contrary, the latest figures reflect a negative differential of .07%, which means that 32 children are involved out of the total number of 4,000 children, who last school year applied for and received transfers. To put it another way, if one subtracts the number of students who transferred from a majority to a minority race situation from the number of students who transferred from a minority to a majority race situation, there is a net loss of 32 children in a more racially balanced situation out of more than 4,000 transfers. Plaintfifs presented no evidence to the contrary; aside from one of their witnesses, Neville Tucker, a former black Board member (from 1967-69) who thought it might have contributed to a greater racial imbalance, but who weakened as to how or why it did so, and then stated that *it was the Board's intention to achieve maximum integration under the transfer plan.* The Court so finds.

SCHOOLS DISCONTINUED SINCE SEPTEMBER 1956

A frequent contention in school desegregation cases is that a Board discontinues schools in order to move the whites to a new or different facility and leave the blacks where they were. Courts are required to give such actions close scrutiny. Since 1956, the Louisville Board has closed twenty-three schools. In thirteen of these closings, greater integration resulted; and in the remaining ten, the effort was minimal in either direction. For example, Frederick Douglas was closed in 1961. Nicholas Finzer was closed in 1965. George W. Morris was closed in 1961. and Hiram Roberts was closed in September of 1961. These children were transferred into the new Carmichael Elementary, which by 1965 had 358 black children and 335 white children. Thus, as a result

of these closings, the Board was able to achieve an almost 50-50 ratio. Georgia Moore was closed in 1956. At the time of its closing, it had 103 black children and no white children. After merging with Haywood, it had 70 blacks and 342 whites. It was admitted by Mr. Charles Walden, *plaintiffs'* research analysis expert, that in every instance the closing of schools by the Louisville District resulted either *in more* integration, or made *little difference.*

Before *Brown I,* supra, and in those neighborhoods which contained a mixture of black and white population, often two schools served the neighborhood. One for black, and one for white. When the Board's desegregation plan became operative, those schools were analyzed, the inferior schools were closed, and the children merged into the remaining school or into a new facility. The majority of the schools that were closed were black schools, and those black children then attended those schools which had been formerly white, thereby establishing an integrated situation.

The special schools within the Louisville District, that is the Brown School, the vocational school, and the Whitney Young Manpower Center, all appear to be racially balanced.

The Court finds that the Board's school closing policy was non-discriminatory and not designed to perpetuate a dual school system, but, on the contrary, to have been designed to achieve maximum integration.

FACULTY AND STAFF DESEGREGATION

The Louisville District began desegregation of its faculty in 1959. Although there was some disagreement, it was then superintendent Dr. Carmichael's view that the student desegregation should precede faculty desegregation. Dr. Carmichael died in 1959, and was succeeded by Superintendent Samuel V. Noe. From

1959 until 1969, over 571 new teachers were employed and 81% of these teachers were black. Further emphasis on faculty balance, however, took place with the arrival of Dr. Walker, although HEW's requirements had always been met. Dr. Walker established the Department of Employee Personnel in 1970, and Mr. Milburn Maupin, the Board's first black assistant superintendent was made chairman of this department.

Dr. Maupin's Department of Employee Personnel is responsible for the hiring, firing and assignment of all teachers, principals, counselors, principal interns and non-teaching employees. His Director of Certified Personnel (teachers) is black, and his Director of Classified Personnel (non-teachers) is also black.

This department was commissioned to establish a plan which would result in no school having less than 35% of both races represented in its faculty ratio *irrespective* of student ratio. A goal of 50% racial representation was fixed so as to allow for flexibility and to provide a reservoir of teachers for this purpose, that a figure of 35% would always be maintainable. It was the announced intention to achieve this goal in three years, however due to a decrease in the number of students, fiscal problems, and tenure laws, the plan was extended to four years at which time Mr. Maupin believes that he will have accomplished the assignment.

In addition to the above faculty desegregation plan, the Board has a policy of biracial administration. If the principal of a school is white, the assistant principal will be black, and the converse is true. There are black principals in predominantly white schools and white principals in predominantly black schools. When a new principal is being selected, the neighborhood school board, community as well as the Board staff is involved. Race, we find is not a consideration; but instead who can best do the job and best serve the children for whom

the Board is responsible seems to be the test. We find every attempt has been made to put a teacher into a situation of helpfulness to the student, rather than to engage in arbitrary assignments in order that the Court might be impressed that the figures look better.

At the commencement of the 1972-73 school year, the Board had 2,231 teachers, 818 of whom were black or 36%. *All* schools had biracial faculties. On the senior high school level, 30% of the teachers were black and ranged 12% to 57% black among those schools. On the junior high school level, 39% of the faculty was black and ranged from 12% to 64% among those schools. On the elementary school level, almost 40% of the faculty was black and ranged from 5% to 63% among those schools. It should be noted, of course, that in those schools where there is a very small faculty, the addition or deletion of one teacher can result in a substantial percentage change, either toward black or white predominance.

Plaintiffs' contention that faculty and student ratio should be identical we find not to stand upon close examination, for such would result in a greater segregated faculty in the event an attendance zone became totally or more substantially black or white. We find the Board pursues the proper goal, i.e., to achieve a faculty of 50-50, irrespective of the student ratio in the school. As expressed in the foregoing, we find the defendant School Board to have indeed achieved what we consider to be a desegregation of its faculty. Nor is there any vestige of a dual school system based upon the proposition of racial imbalance among the faculty.

ATTENDANCE ZONES

Insofar as the establishment of the attendance zones is concerned, the Court finds, and it is amply demonstrated by the demographic data, that the school population reflects the neighborhood. If the neighborhood is 76 to 100% black, the school will be 76 to 100% black. If the neighborhood is 0 to 25% black, the school will be 0 to 25% black. Specific testimony was given to those schools who before *Brown I,* supra, were black and are predominantly black today. In each instance, these schools *at some time in their history* since *Brown I,* supra, have had members of both races in attendance.

High Schools: Traditionally, long before *Brown I,* supra, the Louisville District had operated four high schools; three in the central portion of the City, they being Male High School, for those seeking a pre-college course; Manual High, for those seeking technical training; and Central High, which served the black population; and the fourth, Shawnee, in the west end, a girls' white high school. These schools had been erected in the center of the population areas they served.

As Louisville grew in population, the expansion was to the east, to the south, and to the southeast, requiring east-end and south-end high schools to be sorely needed. Thus, Atherton High School, as it is now constituted, was constructed in 1961 in the southeastern part of the City, but beyond the boundary of the Louisville Independent School District. In 1967, a junior high school (Gottschalk) was converted into a high school in the extreme southern part of the District and designated Iroquois High.

Central High School located in the central portion of the City is traditionally a black high school, having been such before *Brown I,* supra. A new Central High School

was constructed in the year 1950. It is a prestigious and academically oriented school. Few white pupils have attended Central since Louisville's desegregation plan was put into operation in 1956; in fact, there are none there now. Before the year 1971, Central had a citywide attendance zone as it offered specific programs not offered at other high schools. Since 1971, it has shared a common attendance zone with Male High School, 95% black, and Manual High School, 63% white. Central does have a biracial faculty (43% white), and its administrative leadership is biracial. A majority of the black students who attend Central come from the central zone as reflected on Exhibit 85.

During the 1968 investigation by HEW of the above-referred to NAACP complaint, particular attention was paid to Central High School. At one stage of the HEW inquiry consideration was given to the suggestion that Central be paired with Ahrens Trade School and transportation between the two be furnished. Surprisingly, this suggestion was objected to by the NAACP (a sponsor in this litigation now before us) on the ground that if such pairing was done Central *would lose its identity*. Such objection did not, in and of itself, prevent the suggestion from being placed in operation, as there were meritorious reasons advanced and problems confronted which led to the final HEW conclusion that such would not be feasible. Those in the main being that vocational courses could not be installed at Central, designed for academic endeavors, without expensive and extensive remodeling, renovation, and that Ahrens lacked facilities for proper academic instruction, it having been initially designed in 1956 as solely a vocational institution At that same time a rigid zone for Central was considered but it would not have appreciably resulted in any better racial balance at Central and would have, in fact, had no effect on the balance at Male High School.

and would have widened the imbalance at Manual High School. HEW discarded this plan and did not recommend it. Another suggestion was considered by HEW at that time, of pairing Central with Manual, but it was found that that would result only in widening the breach of racial balance at Manual. HEW gave no thought of pairing Central with Iroquois for everyone seemed to agree and we find, as hereinafter will be demonstrated when we discuss Iroquois, that such would have achieved no lasting balance and distance (approximately 6½ miles) was a very important factor.

Atherton High School as it is now constituted is located in the southeastern part of the City of Louisville, but outside the Louisville District. New Atherton was constructed in 1961, after seventeen (17) separate sites were considered before settling on a location that would meet state regulations and provide the necessary space. Atherton had formerly been located in the building now occupied by Woerner Junior High School See Exhibit 87. After the new Atherton High School was opened more blacks attended the new facility than had attended the old facility on Morton Avenue, though it is predominantly white (97%). In fact, attendance figures and the movement of more affluent blacks to the suburbs seem to indicate more blacks will enter this school every year. (Exhibit 62). The attendance zone remained the same as before *Brown I*, supra. We find that the construction of the new Atherton was not undertaken nor designed to perpetuate a dual system or to create a racial imbalance.

Iroquois High School, after opening in 1967, had its attendance zone modified in 1971, and moved further away from Manual, thereby requiring more whites to attend Manual and thus maintaining a better racial mix at Manual High School. Iroquois' present mixture is 99% white; however, it must be noted that it is located

in an area with few, if any, black inhabitants and a great distance from all other high schools. Exhibit 88.

Male High is a startling example of how population shifts can affect the racial composition of a school. In 1956, it had an enrollment of 1,142 whites and 63 blacks. By 1966, the enrollment was 681 whites and 845 blacks. In 1972, the enrollment was 45 whites and 1,396 blacks.

For the purpose of this case it must not be overlooked that the same neighborhood racial pattern exists, due to population migration. The change in student body composition at Male was not the effect of any zone or attendance district modification by the defendant school board.

The original *Shawnee*, a girls' high school, became co-educational in 1950-51 and was, until 1962, housed in the present Shawnee Junior High School facility. In 1962, a new Shawnee Senior High facility was built adjacent to Shawnee Junior High, the former facility having become inadequate for a large senior high and a large junior high. In 1968, an addition was added to Shawnee Senior High to accommodate the still growing student population.

The geographic zone for Shawnee Senior was changed before the commencement of the 1971-72 school year, and the ninth grade was added to the Senior High because Shawnee Junior High was overcrowded. The present zone for Shawnee Senior is generally west of Thirty-fourth Street on the east, the Ohio River on the north and west and the Louisville District line on the south. The zone change did not impede desegregation because the next high school to the east is Central. The zone change did result in white children, formerly in the Shawnee district, becoming eligible to attend Central. Traditionally, however, the white children who live in the Portland area (the extreme northwest portion of the district), a predominantly white area, have generally attended Ahrens Trade School (with a present

ratio of 30% black and 70% white) for vocational training.

Following the Louisville District's desegregation plan, the Shawnee has had an increasing number of black students every year. In 1956, there were 835 white students and 47 black students. The number of black students consistently increased for the next ten years, creating a majority black situation for the first time in the school year 1966-67, when there were 648 whites and 743 blacks. The number of blacks at Shawnee has continued to increase since the 1966-67 school year where today Shawnee has 49 whites and 908 blacks. The changing student population corresponds with changing racial housing patterns caused by the white exodus from the west end of Louisville.

The Court finds that the zone change at Shawnee in 1971 was not designed to, nor did it, impede desegregation. Moving the line east would only have had the effect of taking eligible white children from the Central district and moving it farther west would only takes whites from Shawnee, already then 89% black. The Court finds that there were no racial schemes in the establishment of this new zone line; that it was changed in order to establish a zone for Central and take care of the crowded situation in Shawnee.

Manual High, which shares a common attendance zone with Central and Male High, experienced in this 1972 school year an enrollment of 993 whites and 589 blacks—yet just five years ago its student population was 1,111 whites and 281 blacks. Thus we see that even with the infusion of more whites into Manual High from a movement south of the north line of the Iroquois High attendance zone, that Manual, due to population change and movement, with or without the tip ratio, is, in spite of all the Board has done, or can do, short of transportation, becoming rapidly predominantly black in student makeup.

We find that there has been no "gerrymandering" of attendance zones, and that such attendance zone changes as have been made were directed toward better racial balance. We find no invidious discrimination or dejure acts on the part of defendant School Board that have contributed to the regrettable racial imbalance.

Junior High and Elementary Schools. In an examination of these types of schools we again discover the like patterns of racial imbalance as was experienced in our analysis of the high schools. DuValle, with 4 whites and 842 blacks in its student body, is located in the southwest portion of the city, in an area that is almost totally black in citizenship. There are no contiguous junior high school zones, nor any junior high school zones within reasonable proximity, for which pairing would be viable and lasting. Cotter Elementary occupies the same plant as DuValle and experiences the same population pattern. Meyzeek Junior High with 1 white and 336 blacks, and Washington Elementary occupy the same plant in the central portion of the city in an area known as Smoketown, which is almost totally black in citizenship. Here again we find no contiguous zones by which racial balance would be improved by pairing. The two closest junior high schools to Meyzeek, i.e., Manly and Woerner, with student racial populations of 363 whites to 646 blacks and 495 whites to 345 blacks, respectively, reflect that a pairing with either of these schools would be counterproductive, even if one disregarded distance and traffic conditions; for if the pairing be with Manly the result would still be a three to one ratio black, and if the pairing be with Woerner, the result would be about the same ratio as Woerner possesses anyhow, i.e., 50-50.

Russell Junior High School, with a present student population totally black, and Western Junior High School, with 939 whites and 319 blacks, have contiguous

zones. In 1962, Western became overcrowded and to handle the school population the zone was moved closer to Western. Before this change was made, the defendant Board of Education involved the NAACP and the neighborhood and all other persons who evidence an interest, and the change was effected without objection. We have taken a good hard look at this action, for offhand it appeared that perhaps it would not stand close scrutiny. We learned, however, that Western serves a black and white area and even the moving of the zone by this Court back toward the Russell school, from whence it was taken, would not infuse additional whites into Russell which is all black and would cause more blacks to attend Western, thus bringing into play the "tilt" and, therefore, be of no lasting consequence. As to all of which, when viewed in the light that the change was made without objection by all interested parties, there appears nothing discriminatory nor dejure with respect thereto.

We likewise closely examined a certain complaint about the location of the new Martin Luther King Elementary School, at the time it was in its planning stage. One board member, at least, felt very strongly that King should or could be paired with Shawnee Elementary School under the Princeton Plan. The black population objected and the sponsoring Negro board member, Judge Tucker, one of plaintiffs' witnesses herein, threatened to resign from the board because of the protest. Judge Tucker admitted, however, that the board was willing to attempt the pairing to secure a better balance. This activity took place about 1967. The schools were not paired and by the time King was opened in 1968 both it and Shawnee were predominantly black, 183 whites to 664 blacks, and 288 whites to 438 blacks. So it can be seen that the pairing would have been ineffective insofar as securing any lasting racial

balance was concerned, for by 1972 population movement gave King a student population of 23 whites and 907 blacks, and Shawnee Elementary 97 whites and 804 blacks. Nothing lasting was possible.

We find that the junior high school zones and elementary school zones were established and created to serve the neighborhood community in which the particular schools were located, and were not established with any notion or purpose of invidious discrimination, nor to create a dual school system. In fact, the various zone changes and/or establishments achieved in every instance either more integration or had no negative effect toward racial balance, save one, i.e., the Russell-Western zone above-discussed.

STATE ACTION

The plaintiffs have not joined as defendants the State Board of Education, the Superintendent of Public Instruction, the Governor or Attorney General as has occurred in many such suits as this, including *Bradley* v. *Milliken*, 338 F.Sup. 582 (1971).

Plaintiffs *do demand in their relief* that this Court *end state imposed segregation.* This demand was included, we assume, because in Kentucky local school districts are agencies of the state subject to the will of the legislature. The Constitution of Kentucky, Section 183, *Board of Education of Louisville* v. *Board of Education of Jefferson County, Ky.*, 458 S.W.2d 6.

The General Assembly of the Commonwealth of Kentucky has created a State Board of Education and given it certain general control of the common schools within the state. KRS 156.070 §1. The actual every day administration and control of the local school district, however, is vested in the local school board. KRS 160.160 and KRS 160.290:

"160.160 (4399-17; 4399-18) Board of education; nature; corporate powers.

"Each school district shall be under the management and control of a board of education consisting of five members, to be known as the 'Board of Educaton of _____, Kentucky.' Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; make contracts; purchase, receive, hold and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created."

"160.290 (4399-20; 4399-33) General powers and duties of board.

"(1) Each board of education shall have general control and management of the public schools in its district and may establish such schools and provide for such courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the rules and regulations of the State Board of Education. Each board shall have control and management of all school funds and all public school property of its district and may use such funds and property to promote public education in such ways as it deems necessary and proper. Each board shall exercise generally all powers in the administration of its public school system, appoint such officers, agents and employes as it deems necessary and proper, prescribe their duties, and fix their compensation and terms of office.

"(2) Each board shall make and adopt, and may amend or repeal, rules, regulations and bylaws for its meetings and proceedings for the government,

> regulation and management of the public schools and school property of the district, for the transaction of its business, and for the qualification and employment of teachers and the conduct of pupils. The rules, regulations, and bylaws heretofore made by any governing body of a school district, or hereafter made by a board of education, shall be consistent with the general school laws of the state and shall be binding on the board of education and parties dealing with it until amended or repealed by an affirmative vote of three members of the board. The rules, regulations and bylaws shall be spread on the minutes of the board and be open to the public."

There was not one scintilla of evidence offered during the trial of our instant action to the effect that the State Board of Education, the Superintendent of Public Instruction or the General Assembly of the Commonwealth of Kentucky has done anything whatsoever to perpetuate a dual school system, or that they have done anything to impede the desegregation effort of the local school districts within the Commonwealth of Kentucky.

Section 183 of the Constitution of Kentucky says, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." Under the broad power, the General Assembly has the authority to create, abolish, alter and do about anything they please with the local school districts as long as they do not offend some other constitutional provision of equal dignity. *Board of Education of Louisville* v. *Board of Education of Jefferson County, Ky.*, supra.

During the trial, there was some testimony about school merger. The General Assembly has provided in Kentucky for two methods for the merger of an independent school district with a county school district. KRS

160.041 and KRS 160.048. One by which two school boards may bring it about, and the other by which the people may petition boards for the transfer of property. Recognizing that local school districts are best qualified to make decisions about merger and transfer of property, the General Assembly has provided a method by which it may be done but has not demanded it.

There is of course a difference in opinion about the general desirability of school district merger. Some feel that making two districts into one will result in efficiency, and others that creating one large district will make it more cumbersome and less responsive to the people it is supposed to serve. These are matters best left to the people and their elective representatives rather than the courts. There is also, of course, always the problem of outstanding bonded indebtedness which must be very carefully considered in any merger proposal; otherwise, the credit of the resulting district may be seriously impaired.

During the regular session of the 1972 General Assembly, KRS 160.607 was enacted. This enactment allowed the Jefferson County and Louisville school systems to increase their occupational license fee by ¼ of 1% for a period of two years only. It allowed the Lousiville system to receive the first $600,000.00 collected, because it had a deficit, and otherwise provided that the balance be distributed according to KRS 160.486, or on an average daily attendance basis between both affected districts. Some members of the General Assembly wanted to condition the enactment of KRS 160.607 on the proposition of forced merger of the Louisville and Jefferson County systems. The majority, however, did not share this view and no merger section was included in this act. This action related to the earlier discussed disagreement as to the desirability of

mergers generally and had absolutely no relationship to race or school desegregation.

During the regular session of the 1968 General Assembly, House Bill #297 passed in the House but failed in the Senate. This act related only to Jefferson County and called for the establishement of a metropolitan education district. It required the establishment of no fewer than five community school districts drawn in such a manner so that each district would have as nearly as possible a balanced distribution of social, economic and ethnic groups and of approximately equal pupil memberships. The act did not require the assignment of pupils to schools nor transportation to overcome racial imbalance. Thus, while the bill called for equal ratios in a particular subdistrict, it did not require equal ratios in any one given school. Therefore, it cannot reasonably be asserted or concluded that the defeat of this bill in the Senate was due to any design to prevent a mixture of the races in schools. House Bill #297 involved a radical departure from the Kentucky school structure and would have encountered serious problems as to its unconstitutionality in the Court of Appeals of Kentucky, inasmuch as it was special legislation. *Board of Education of Jefferson County* v. *Board of Education of Louisville, Ky.*, 472 S.W.2d 496 (1971).

Thus, based on the foregoing, this Court finds no evidence of any state action including, but not limited to, the Governor, General Assembly, the State Board of Education, the Superintendent of Public Instruction and the judiciary, which has resulted in the perpetuation of a dual school system, impeded desegregation of public schools in Louisville and Jefferson County or has interfered with their operation of a unitary school system.

TRANSPORTATION

The evidence reflects that studies by the defendant Board of Education to this date indicate that cross-transportation for the abolition of racial imbalance in its system would involve the movement of 28,000 to 31,000 pupils daily, with an initial capital outlay for equipment and first year's cost of operation of about $7½ million. After the first year, operational costs would approximate $4-1/3 million annually. The State of Kentucky, under its Minimum Foundation Program, would provide $700,000.00 of the annual cost under presently existing formulae.

CONCLUSION

We have examined and viewed the evidence in this entire matter "from its four corners."

No one can seriously dispute that the Louisville Independent School District moved with dispatch and diligence to integrate its schools and faculty following *Brown I*, as evidenced by what in fact did occur, as hereinabove factually found by us.

Likewise, no one can seriously dispute that during the ensuing years, particularly since 1965, regrettable racial imbalance did indeed begin its catena; however, such imbalance did not germinate from, nor has it prolifereated from, any acts or failures to act by school or state authorities. The proliferation has been the result, in spite of efforts of resistance by the defendant Board, of white flight, neighborhood housing patterns and socioeconomic factors; not dejure acts or failures to act.

So we come to the legal determination of whether or not, under these facts, the adoption by us of "the useful tool of transportation," its expense, inconvenience and accompanying problems is constitutionally mandated of us, merely and solely for the purpose of obviating

racial imbalance, (keeping in mind that in this case plaintiffs make no contention of inequality of schools or substandard education or instruction). We think not.

Brown I, supra, required the dismantling of dual school systems and the creation of unitary school systems. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), however deals quite specifically with the duty of school authorities to eliminate racially separate schools maintained by state action and the powers of federal courts to order such measures as are necessary to effect complete desegregation immediately. We interpret the *Swann* opinion to pronounce that the federal court is precluded, by Title 4 of the Civil Rights Act of 1964, 42 U.S.C. Section 2,000c, and by unanimous opinions of the Supreme Court, from imposing upon school authorities the affirmative duty to cure racial imbalance in situations where that imbalance *is caused by de facto conditions.* Conversely, we believe that it is apparent in *Swann*, supra, that it is the duty of school boards to come forward with a plan that promises realistically to work in those cases in which it can be demonstrated that there are vestiges of state imposed segregation maintained by the boards' action, policies or inactivity. *Swann* plainly teaches that school authorities may indeed have the power to formulate and implement educational policy which would include a prescribed ratio of black to white students reflecting the proportion for the district as a whole. But *Swann*, supra, page 16, says plainly:

> "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a Federal Court."

Recognizing as we do that schools predominantly of one race in a district of mixed population require close scrutiny to determine that school assignments are not part of state enforced segregation, we nevertheless recognize that the Supreme Court determined the existence of some small number of one race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law.

We find that the school officials have been aware of the responsibilities imposed upon them by the advancing state of the law as it has developed by the courts since *Brown I.* We find that they have undertaken to comply with the letter and the spirit of the law and that there is not at this time any constitutional violation of the rights of the plaintiffs or any other children in the defendant Louisville school system *and that the system is a unitary system.*

From what we have said hereinabove, it follows that we need not consider further the principal claims that there can be no complete elimination of vestiges of state imposed segregation in the Louisville system unless such system is merged in whole or in part with the Jefferson County system.

JUDGMENT

The Court, therefore, having fully considered this case in the premises as aforestated, it is now ordered and adjudged:

(1) That plaintiffs' complaint, the intervening complaint and the second intervening complaint against the defendant, Board of Education of Louisville, Kentucky and its superintendent, Dr. Newman Walker, be and are hereby dismissed with prejudice.

(2) That the Board of Education of Louisville, Kentucky and its superintendent, Dr. Newman Walker,

have desegregated the Louisville school system and are now operating a unitary district.

(3) That the defendants shall have their costs herein expended for which execution may issue, and

(4) That this is a final judgment and there is no just reason for delay.

Dated March 8, 1973

/s/James F. Gordon
JAMES F. GORDON
United States District Judge

MEMORANDUM OPINION AND JUDGMENT
Entered March 8, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
Civil Action No. 7045

NEWBURG AREA COUNCIL, INC., Mrs. Sarah White, Mrs. Johnie Mae Wright and Mrs. Suzanne Post — Plaintiffs

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KY., A Body Corporate and Richard Van Hoose, Superintendent Jefferson County Public Schools — Defendants

MEMORANDUM OPINION AND JUDGMENT

The Pleadings and Issues

On August 27, 1971, Newburg Area Council, Inc., a community organization in the black Newburg community of Jefferson County, Kentucky and three citizens filed an action against the Jefferson County Board of Education and its Superintendent. The action purported to be a class action on behalf of persons so numerous as to make it impractical to bring them before the Court and claimed that prior to 1955 the Board of Education of Jefferson County, in accordance with state law, maintained a racially segregated school system with white pupils and teachers assigned to certain schools and black pupils and teachers assigned to other schools. Admitting that the Board undertook, following the decision of the *Brown* case, to desegregate the school system, plaintiffs contended that the efforts of the Board have not been sufficient and that all vestiges of state imposed segregation had not been eliminated from the school system. The thrust of the Complaint was that the Board had created and redrawn attendance zones in such a way as to increase, rather than reduce, the degree of racial segregation and, in particular, it was complained that the Board had rebuilt Cane Run Elementary School in such a manner as to increase segregation. It was further complained that the Board continued to maintain Newburg Elementary School as an all black school and had constructed new schools and redrawn attendance lines in other surrounding areas in such a method as to increase rather than to reduce racial segregation. The Complaint sought a declaratory judgment determining that the Board was not operating the

school system in accordance with the requirements of the Constitution and that the Board should be required to take further steps to convert the school system to a unitary system, eliminating all vestiges of state imposed segregation and that the Board be required to draw attendance lines, select school sites, and make decisions relative to the closing of schools and the hiring and assignment of teachers so as to achieve the greatest possible degree of integration in the schools. Specifically, the Complaint demanded that the Board be required to present a plan providing for the desegregation of Newburg Elementary School, Bashford Manor Elementary School and Goldsmith Elementary School; that the attendance zones for Price Elementary School, Watterson Elementary School and Klondike Elementary School be redrawn; that the pupils be reassigned; that attendance zones for Cane Run Elementary School and Schaffner Elementary School be redrawn and that bus routes and busing assignements be changed to conform to the new attendance zones.

Finally, the complaint sought to require the Board to present a plan requiring the Board to recruit black faculty members so that at least four percent of all teachers employed by the system were black and that black faculty members be assigned to schools in the same proportions as black pupils are assigned to a particular school and that by the 1972-73 school year the black-white teacher ratio *in each school* shall correspond to the black-white teacher ratio *in the entire system.*

The Board of Education filed a timely answer in which it set forth the statistics relative to the size of the school system and the fact that all students in the school

system were required to attend the school which is located in the school attendance zone in which they live. The Board admitted that it had complied with the statutes of the Commonwealth of Kentucky and the rules and regulations of the Department of Education of the Commonwealth of Kentucky with reference to the assignment of Caucasian and Negro children *prior to 1955*. The Board alleged that beginning in 1955, following the decision of the Supreme Court of the United States in the *Brown* case, it had begun to formulate plans to desegregate the school system and thereafter began to discontinue schools whose student body was 100% Negro and completed the integration of all students in grades 7 through 12 and took additional steps in an effort to remove and eliminate from the Jefferson County School system all vestiges of state imposed segregation. The Board asserted that the Newburg Elementary School had remained a school whose student body was nearly 100% Negro because of the fact that the population living in the attendance zone in which the school was located was primarily Negro. The Board further alleged that it had on several occasions redrawn attendance zones so that Negro students were diverted from the Newburg Elementary School to newly constructed elementary schools in the Newburg area which previously had a predominantly white population.

With reference to the Cane Run Elementary School, the Board maintained it to be a school that was constructed to replace an original building, that its occupancy was anticipated in September of 1972 and that

surveys of the area indicated that the location was the best possible geographic location to serve the school children in the area. The Board denied that it had knowledge or projections or information that the population of the Cane Run Elementary School attendance zone would be predominantly Negro and contended that when Schaffner Elementary School was constructed, attendance zones were redrawn so that overcrowded facilities of Mill Creek and Cane Run Schools were partially relieved by Schaffner. Cane Run at this time had only 17 Negro pupils. The Board stated that since 1954, the pupil population of the system had increased by a total of 62,000 students, of which approximately 2400 were Negroes.

With reference to teachers employed in the system, the Board admitted that the ratio of Negro teachers employed was not identical with the ratio of Negro pupils to white pupils in the school system but alleged that every effort was being made to enlist Negro teachers and that efforts were being made to integrate the faculties of the various schools as far as possible.

On June 22, 1972, John Haycraft and Hazel Lane filed Civil Action 7291-G which was brought by them against both the Board of Education of Louisville and the Board of Education of Jefferson County. That action was sponsored by the Kentucky Civil Liberties Union and, in particular, demanded that the Court transfer that part of the Jefferson County school district which lies within the corporate limits of the city of Louisville to the Louisville Independent School District. Such complaint set forth numerous allegations against the

Louisville Board of Education, contending that it was maintaining a dual school system and was not taking the necessary and appropriate steps required to accomplish a unitary system. With reference to the Jefferson County Board of Education, the Haycraft suit adopted by reference and incorporated all of the allegations of the complaint in the Newburg Area Council suit. This complaint, like the Newburg Area Council complaint, sought a declaratory judgment that the Louisville Board was not operating the Louisville Independent School District in accordance with the requirements of the Constitution and had not undertaken to eliminate all vestiges of state imposed segregation. It was further contended that the failure of the Louisville Board and the Jefferson County Board to include within the Louisville school district all territory within the corporate limits of the City of Louisville, commonly referred to as the "fringe area" and sixth-class cities physically located within the incorporated boundaries of the City of Louisville was in violation of the Constitution. It was demanded that the two Boards be required to execute an agreement providing for the transfer to the Louisville Independent School District the area within the corporate limits of the City of Louisville not now included within said district.

Subsequently, in July of 1972, intervening complaints were permitted by the Court on behalf of individuals represented by attorneys for the Kentucky Commission on Human Rights and by the Louisville and Jefferson County Federation of Teachers, Local No. 672. These intervening complaints, which joined the

Anchorage Independent School District with the Board of Education of Louisville and the Board of Education of Jefferson County, sought to require that the three school systems be *merged into one countywide school system* as the only appropriate means of accomplishing complete integration of the school systems and the abolition of all vestiges of state imposed segregation. The intervening plaintiff, Louisville and Jefferson County Federation of Teachers, Local 672, joined in the prayer for relief, demanding that all three of the school systems within the county be merged and in particular sought protective remedies for the welfare of the teachers within the various school systems. So much for the pleadings.

Threshold Orders of the Court

Prior to the trial hereof, we entered certain threshold orders in both cases, to the effect that this Court lacked the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the Northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, of the claims of all plaintiffs, against the Louisville Independent School District and then against the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradley* v. *School Board of the City of Richmond*, 462 F.2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit had not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was so *invidious* and *dejure* and further wherein the district court might be so "*locked in*" by existing political boundaries that its desegregation problem became *insusceptible of any solution other than* by the crossing of political boundary lines, that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Fourth Circuit rule. We believe our judgment in this regard was vindicated, for at commencement of trial renowned counsel for the plaintiffs stated his position in this Jefferson Board action to be the same as that taken in the immediately prior Louisville Board case, namely:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours).

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary, to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecessary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradely, et al, v. Milliken, Governor, et al,* 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development of the entire factual story, we have properly met our duty, whichever way the ball bounces.

This memorandum opinion and judgment relates solely to the claims against the Jefferson County Board of Education and its superintendent.

The Present Jefferson County School System

The evidence reveals that the Jefferson County School District encompasses approximately 280 square miles, as compared with the Louisville Independent District which contains approximately 65 square miles. The number of schools being operated by the Jefferson County Board is 103, of which 74 are elementary schools, 5 are middle schools and 18 are combined junior and senior high schools. In addition thereto, the Board operates 6 special type schools, including Ormsby Village, a custodial care for children, and a reception center for juveniles. The number of pupils in the Jefferson County school system at the end of the first pupil month, September 27, 1972, was 95,856, of which 92,163 were white and 3,693 were black so that the percentage of black students to white students in the entire system is 4.01%.

Since the middle schools operated by the County Board and the senior high schools operated by the County Board *are not criticized* by the plaintiffs, it is appropriate at this juncture to state that the record reveals (Exhibit II A) that in the 74 elementary schools operated by the County Board, there are 44,896 white children, 1,774 black children, or a total of 46,670 students, of which 3.8% are black. Of a total number of 4,020 teachers in the Jefferson County system, 3,877 are white and 143 are black so that the percentage of black teachers to white teachers in the entire system is 3.6%. In addition thereto, among the certified administrators at the central office of the school system which total 100, 96 are white and 4 are black, or 4% thereof.

The method of pupil assignments in the County system is dictated entirely by the capacity of the school serving a particular district. The population of pupils is studied and boundary lines drawn to include the number of pupils which can be adequately housed by the school facility. Allowance is made for future growth when possible. Natural boundaries and methods of ingress and egress to the school are taken into consideration. There is *no transfer system* within the county school system and all pupils are assigned to the schools on the basis of residence. The school attendance zones are redrawn from time to time to reflect changes in the school population and the construction of new schools.

History of Integration in the Jefferson County School System

In 1955, the year following *Brown*[1], the Jefferson County Schools had a pupil population of approximately 32,000 which included approximately 1,000 Negro pupils. At that time there were approximately 1,066 teachers, of whom 36 were Negro teachers. Prior to *Brown*[1], Negro elementary pupils were housed in eight buildings. One was a twenty-room modern school while the others were small, one to four-room buildings. There were no high school facilities for Negro pupils since the County school system paid tuition and transportation for Negro high school students to attend schools for blacks operated by, and within, the Independent School District of Louisville.

Following *Brown*[1] and beginning in 1956, the following steps were taken by the Jefferson County Board to accomplish integration. In 1956 Orell, a two-room school was discontinued and the Negro pupils were assigned to the school in the district in which they lived. Negro

pupils in grades 1 to 6 were assigned to the elementary school in the district in which they lived, while those in grades 7 and 8 were sent to Butler and Valley High Schools, predominantly white schools. At Newburg, which was an all black school prior to *Brown*[1] children in the 9th grade were assigned to high schools of the county and many Negro pupils living in various sections of the county that had been attending Newburg prior to *Brown*[1] were assigned to previously all white schools in the districts in which they lived. All Negro pupils in grades 7 and 8 in the entire county were given a choice of remaining at the all Negro school or of enrolling in the high school in the district in which they lived. All pupils entering high school (grades 7 through 12) for the first time were *required* to enroll in a county high school which had been all white previously. Pupils previously enrolled on a tuition basis at Central High School in Louisville and Lincoln Institute in Shelby County were given a choice of entering a county high school or of finishing where they were already enrolled.

In 1957, two more Negro schools were discontinued, Worthington and Jefferson Jacobs. The Negro pupils were integrated in previously all white schools in the district in which they lived. Also in 1957 all 7th and 8th graders at Dorsey, Forrest and Griffeytown were integrated into high schools in the districts in which the pupils lived. Griffeytown, like Newburg, had historically been a black community. In 1958, all Negro pupils in the 7th and 8th grades at Jeffersontown Negro School and Newburg were integrated by transferring them to previously all white schools in the district in which they lived and thus by 1958 there had been completed by the School Board integration of all pupils in grades 7 through 12 in all county schools. Only five schools with

all Negro population then remained in existence. They were Newburg, Forrest, Dorsey, Griffeytown and Jeffersontown. The total pupil membership was 286 with ten black teachers.

In 1959 Griffeytown was discontinued as a black school; in 1961 Dorsey was discontinued and all of its pupils were assigned to integrated schools in the districts in which they lived; in 1961 also, grades 4, 5, and 6 were withdrawn from Forrest and sent to the integrated Middletown school. By 1963 the final steps of total integration were completed by abandoning the two-room, all Negro school at Forrest and the four-room, all Negro school at Jeffersontown. The pupils attending these two schools became a part of the membership of the schools in the district in which they resided.

While the Newburg school remained predominantly black, all pupils living within the Newburg district were required to attend and white pupils were enrolled on several occasions.

In 1963, the first step toward faculty integration was accomplished, since teachers in the Forrest and Jeffersontown Schools, which had been previously all black, were assigned to schools which had previously had all white faculties. In 1964, additional faculty integration was accomplished by placing black teachers in two previously all white school situations. We find that 1965-66 was the year in which a serious effort was made to integrate the Newburg faculty which had previously been all black. Teachers throughout the system were asked to express an interest in joining the Newburg faculty, and as a result thereof, four white teachers were brought into the faculty at Newburg for the 1965-66 school year. By that date there were a total of 53 black teachers assigned to nine integrated faculties.

Continued progress in faculty integration was accomplished in 1966 and 1967 so that by the conclusion of that year, there were 63 black faculty members assigned to 15 different integrated faculties (Jefferson County Board Exhibit 30).

In 1967 and 1968, 1968-69 and 1969-70 school years, there was determined progress in faculty integration so that by the conclusion of the 1969-70 year, there were 91 black faculty memebers in 35 integrated faculties. The school year 1970-71 was an increasingly difficult year to employ black teachers because of the competitions from industry with its higher salaries and in 1970-71, through retirement and other losses, the system actually lost numerically from the standpoint of integrated faculties so that at the end of 1971, there were only 86 black teachers in 35 integrated schools.

In 1971-72 the system accomplished its goal with reference to the Newburg faculty by reducing the number of black teachers at the Newburg school from 22 to 11. The evidence is undisputed that at the beginning of the 1972-73 year, there were 143 black teachers in 81 faculties, showing a net gain of 47% black faculty members. Fifty-two (52) new black teachers were employed for the 1972-73 school year but there had been actual offers made to 70 black teachers of whom 18 (25%) apparently, after having made application in good faith, refused positions offered (Jefferson County Exhibit 30). It is definitely established that the system has experienced difficulty in attempting to recruit black teachers to the predominantly white Jefferson County School system.

Attendance Zones

In 1966 the County Board began the erection of middle schools, which are schools housing pupils in the 6th,

7th and 8th grades, and deliberately placed such middle schools adjacent to those areas where the percentage of blacks to non-blacks is high. The middle schools increased the geographical attendance area and thereby resulted in integrating the schools more desirably. For instance, a middle school was constructed on Indian Trial and opened in September of 1971, and another was constructed on Klondike Lane and opened in September of 1972, helping to further integrate those communities. At the Bruce Middle School on Indian Trial, opened in September of 1971, there were 70 black pupils or 8% of the pupil population; and at the Meyers Middle School, located on Klondike Lane and opened in 1972, there were 14% black pupils. The erection of these middle schools resulted in removing the sixth grade pupils from the Newburg School and thus again reduced the black population in the Newburg School and increased the black population in the newly erected middle school.

Issues and Contentions

Although the allegations of the complaint and intervening complaints leveled rather broad criticism at the Jefferson County school system, the evidence introduced narrows the issues between the parties very considerably. No complaint was made concerning the high schools and middle schools in the system or of the refusal of the Board of Education to permit optional attendance areas. Counsel for the plaintiffs conceded that from a curriculum standpoint and pupil-teacher ratio standpoint, there was no substandard educational program in any of the particular schools.

In short, the plaintiffs are contending that the Board has made discretionary decisions which retained vestiges of state imposed segregation by reason of the

concentration of approximately 56% of the total number of black elementary school children in three elementary schools, Newburg, Price and Cane Run. Plaintiffs maintaining that the policy of the Board has kept the Newburg school deliberately below capacity, while nearby white schools have been overcrowded to the point of using portable classrooms and double sessions. Plaintiffs insist that the only remedy for this situation is for the Board to *transport white elementary school children* into the Newburg school in order that this school may be racially balanced and to redraw the school attendance zones and/or to pair or cluster students in the Cane Run area in order to prevent the steady increase of black children in the Cane Run school.

The Board of Education, on the other hand, contends that its efforts to decrease the size of the Newburg Elementary School, to integrate its faculty, and to distribute black children living in the Newburg community into other adjoining areas containing elementary schools which are predominantly white, as well as the addition of a middle school on Klondike Lane, represent practical and workable solutions to the Board's responsibility to do away with all vestiges of state imposed segregation. In addition, the Board pointed out consideration that has been given to redrawing school attendance zones in the Can Run-Schaffner area in order to lessen the impact of the sudden influx of black children who moved into the Cane Run area after the school was planned and erected. Finally, the Board insists that the plaintiffs' solution of requiring the Board to transport white children by cross-busing or in a "leap-frog" fashion into the Newburg and other elementary schools would not provide any permanent solution to the continuing responsibility of the school board to maintain a unitary school system.

We shall examine these contentions and issues in the light of the evidence introduced and in accordance with the guidelines laid down by the Supreme Court.

The Newburg Area Problem

The plaintiffs' evidence consisted of the introduction of Mr. Charles Walden, employed by the Kentucky Human Rights Commission as a research analyst, and the cross-examination of Superintendent Van Hoose and Associate Superintendent John Ramsey.

Mr. Walden's testimony was, as in the case involving the Louisville Independent School District, primarily a statistical analysis of the Jefferson County system and the individual schools with reference to the ratio of black and white students and of teachers. The essence of Mr. Walden's testimony was that some 56% of the total number of black children in the Jefferson County system were assigned under the residential assignment plan to three schools, Newburg, Price and Cane Run. In addition, Mr. Walden testified in detail as to the capacity of the elementary schools in the Newburg area, that is, Newburg, Bashford Manor, Indian Trail, Price, Slaughter and Rangeland. Actually, from maps introduced by the County Board, it is apparent that the Gilmore Lane school is not contiguous to the Newburg schools, nor is Slaughter. The defendant, Jefferson County Board, introduced a large map as Jefferson County Board Exhibit 33, showing the district zone boundaries of the elementary schools in the Newburg area including Indian Trail, Newburg, Bashford Manor, Price, Rangeland and Slaughter. These maps were helpful to the Court in that there was a pin for every student in the district located on the street on which the student lived. These pins of varying colors enabled the Court to

see vividly the demographic distribution of the children in the various schools districts under consideration. A copy of the Board's Exhibit 33 is filed with this opinion, since reference is made thereto from time to time herein.

It was the contention of Mr. Walden that at a time when the Newburg school was not being used to capacity but indeed was considerably below capacity the Board made discretionary decisions which considerably overcrowded elementary schools immediately adjacent to Newburg to such an extent that portable classrooms on some occasions were required to be installed. Mr. Walden referred throughout to a capacity of Newburg Elementary School of 1,242 students; however, the School Board showed beyond question by its Exhibit No. 15 and by the testimony of Associate Superintendent John Ramsey that the capacity of Newburg Elementary School was not reached until the year 1961 and as a result of two additions made thereto, one in 1959 which increased the capacity from approximately 600 to 750 and another in 1961 which increased the capacity from approximately 750 to 1242. It is interesting to observe that in 1961 when the Newburg School was brought to a maximum capacity, at that time it housed not only an elementary school but also a junior high school and contained grades 1 through 9 inclusive. We have previously pointed out in this opinion dealing with the history of integration in the Jefferson County School system that the Board had deliberately abolished the junior high school at Newburg in 1958 in order that all 7th and 8th graders in the school system might be integrated into previously all white schools in the district in which they lived. Mr. Ramsey testified that because of community demands upon the Board, in 1961 the school facility at Newburg was increased in size in order to permit the maintenance there, at Newburg,

of both an elementary and a junior high school. In 1968 the Board again reduced the school to an elementary school containing grades 1 through 6 and the children in grades 7 through 9 that had been attending at Newburg were again transferred to adjoining, neighboring schools which had been previously all white or which had been erected in the interim.

Mr. Walden testified and gave specific figures reflecting that during the years 1968-69, 1969-70 and 1970-71, the schools at Rangeland, Indian Trail, Gilmore Lane, Bashford Manor, Price and Slaughter were all operating in such a fashion that there were more students than the rated capacity of the school which, on some occasions, required the erection of portable classrooms on the school grounds. For example, for the years 1968-69, Rangeland with a capacity of 702 had 1105 students; Indian Trail with a capactiy of 729 had 872 students; Gilmore Lane with a capacity of 675 had 855 students; Bashford Manor with a capacity of 702 had 796 students; Slaughter with a capacity of 675 had 722 students; the Price school was not built until 1969. Mr. Walden pointed out that the Newburg school, although having a capacity in 1968-69 of 1242 students, had 732 in attendance. From these statistics the plaintiffs ask us to conclude that there were deliberate discretionary decisions by the Board relative to the use of Newburg school which inevitably continued that school as a racially segregated school. On the contrary, the Board's evidence, as is set forth in Jefferson County Exhibit 15, and by Superintendent Van Hoose and Associate Superintendent Ramsey, shows that as early as 1959 and consistently thereafter, the Board was engaged in an effort to integrate the children in the solidly black Newburg community into adjacent white communities by

sending children to Indian Trail school in 1959; in 1960 into Bashford Manor school and into the new Rangeland school which was constructed in 1962, and eventually to the Price school which was erected nearby and immediately adjacent to the Newburg school in 1969, for the very purpose of decreasing the all black student population of the Newburg school. In addition to that, two middle schools have been erected, one at Klondike Lane and one on Indian Trail which contain children attending the 6th, 7th and 8th grades which additionally has reduced the number of all black students at Newburg and contributed to the integration of the school system as a whole. It is clear from the evidence that through and including the year 1968, the Newburg school was indeed used to capacity by students who lived immediately around the school and during the years 1954 (following Brown) to 1968 the School Board could not have effectively increased the number of students in the Newburg facility. The Court finds that the decreased capacity of the Newburg school for the years 1968-69, 1969-70 and 1970-71 was the result of the deliberate action of the Board to increase integration within its school system.

The plaintiffs were critical of the Board's failure to use to full capacity the Newburg School during the school years 1968-69, 1969-70 and 1970-71 as revealed by the testimony of Superintendent Van Hoose and Associate Superintendent Ramsey and contended that the failure to use the school to capacity was a deliberate refusal on the part of the Board to bring white students by bus from adjoining areas into the all-black facility.

Both Mr. Van Hoose and Mr. Ramsey pointed out, and it is evident from a look at the map of the area, that to transport students back into the Newburg facility in 1968-69, 1969-70 and 1970-71 would simply bring back

into the area black children living in the area who had been integrated into adjacent school areas. The only alternative to bringing back into Newburg the black children who were moved out for the sole purpose of integrating the school system would be to find white school children at distant school districts and transport them in a leap-frog or cross-busing fashion past black children being transported from Newburg to the integrated adjacent white schools. We do not read in any decisions of the Supreme Court any requirement that such impracticalities be engaged in.

Plaintiffs, in their examination of the school superintendents, were particularly critical of the Board for erecting the Price elementary school at a distance of only one mile from the Newburg school facility at a time when the Newburg school facility was not being used to its maximum capacity. The evidence reflects, however, that immediately adjoining the Newburg school and between the Newburg school and the site of the new Price school were proposed urban renewal developments and the erection of a subdivision which caused the Board and its staff to believe that there would be a considerable influx of housing in this area which would result in the requirement of additional space at Newburg school to house the children of these families. It was anticipated that 500 new homes would be constructed in this area requiring school facilities for approximately 1000 children. It was also pointed out that an additional and important consideration in the location of the Price school was the fact that the site upon which Price was located was the only available site in the area which would provide relief for the adjacent Rangeland school which had been overcrowded since approximately 1964. The location of the Price school,

therefore, afforded the Board a place to put approximately 400 children from the overcrowded Rangeland area and at the same time to place black children from the Newburg school area in a situation where there would be integration.

The Board's testimony was that a third consideration in the location of the Price school in 1969 was the suggested guideline of HEW that when new facilities were erected, an attempt be made to achieve an approximate population ratio of 20-25% black students and when the Price school was opened in 1969, the actual ratio achieved at the time the school was opened was approximately 30% black students.

The final criticism of the Board with reference to the Newburg area school problem was developed in Mr. Walden's testimony concerning the percentage of children bused in the various schools. Mr. Walden testified that at the Gilmore Lane school, 70% of the white children were transported by bus and none of the black; Bashford school, 68.5% of the white children and 92.8% of the black children were transported by bus; at Rangeland 8.9% of the white children were transported by bus and 22% of the black children; Slaughter, 44.1% of the white children and none of the black children; and Indian Trail, 64% of the white children and 90.6% of the black children. Apparently, the plaintiffs desire the Court to conclude from these statistics that the Board is engaged heavily in transporting black children in this area, whereas the facts show, and a reference to the map reveals, that at the Bashford Manor school, where 92.8% of the black children are transported by bus, these same children could walk to the Newburg school and the fact that they are being transported to the Bashford Manor school is the Board's deliberate effort to integrate these

children with white children in the Bashford Manor area. Also in connection with the Indian Trail school, although it is true that there is a safety factor involved in the crossing of Poplar Level Road, it is nonetheless true that the black children who are being transported to the Indian Trail school for the most part live within walking distance of the Newburg school and, except for the Board's policy of attempting to integrate them with white children, could attend the Newburg school without being transported.

The Court is not much impressed with the statistics presented by the plaintiffs with reference to the Gilmore Lane and the Slaughter schools as being evidence of busing no black children, since there are relatively no black children in these two schools who live more than walking distance from the schools. In fact, Jefferson County Board Exhibit 2B reflects that there was only one black child at Gilmore Lane and one black child at Slaughter in 1971-72, who lived more than walking distance from the school.

The Cane Run-Schaffner Problem

The plaintiffs, in their complaint, allege that by design or neglect the Jefferson County School Board has constructed new schools and redrawn attendance zones in such a way as to increase rather than reduce the degree of racial segration that exists in the school system and make it likely that an even greater degree of racial segregation would exist in the future. In particular, it was alleged that the Cane Run elementary school was rebuilt at the same site in an area into which blacks have been moving and that the Board redrew attendance zones in such a way that the Cane Run school was approximately 40% black. It was the plaintiffs' conten-

tion that the Board undertook such action despite its knowledge of projections that in the future the population of the Cane Run elementary school attendance area would be predominantly black. Plaintiffs insist that the Board did not draw attendance zones in such a way as to assign black students to both Cane Run elementary school and the nearby Schaffner elementary school which it is alleged is 99.18% white, although, the plaintiffs claim, these lines could easily have been drawn to avoid this situation.

In support of the allegations, Mr. Walden, the statistician, showed that the Cane Run school had been rebuilt in the year 1972 on the same site where the former elementary school had been located. Mr. Walden testified that in the school year 1966-67, there were 653 white children and 8 black children, or a percentage of 1.22 black; that in the year 1967-68, there were 750 white children and 50 black children, for a percentage of 6.25 black; that in the year 1968-69 there were 572 white children, and 196 black children, for a percentage of 25.52% black; in the year 1970-71 there were 375 white children, 245 black children for a percentage of 39.52% black; in the year 1971-72, there were 358 white children and 299 black children, for a percentage of 45.51% black. For the current school year, 1972-73, there are 323 white children, 311 black children for a percentage of 49.5% black. Mr. Walden also pointed out that the records of the School Board filed in answer to the interrogatories showed that 98% of the black children attending the Cane Run school were transported there by bus; 77.20% of the white children were bused. In the Schaffner school for the year 1972-73, Mr. Walden testified that there were 589 white children and 4 black children, while at Crums Lane there were 600 white children and 10 black

children with 100% of the black children being transported to the school by bus, and 71% of the white children being transported. Mr. Walden testified finally that Mill Creek had a population of 665 white children and 22 black children and that 86% of the white children were transported by bus and 100% of the black children were transported by bus.

Based on these figures, the Court understands it to be the plaintiffs' contention that the Board made discretionary decisions which retained vestiges of state imposed segregation *by failing to transport by bus black children* from the Cane Run school zone area into Crums Lane, Schaffner and the Mill Creek areas. It is recalled *that busing of black children in the Newburg-Price-Rangeland area was severely criticized by the plaintiffs.*

The Board's testimony concerning this situation consisted primarily of a map, Jefferson County Board Exhibit 34, a copy of which is filed with this opinion, and an explanation by Associate Superintendent John Ramsey of the situation in the Cane Run area and the Board's proposed actions regarding it.

Mr. Ramsey pointed out that in the Cane Run school zone area there is a very large area of land which is devoted solely to commercial usage. That study of the map and the pins quickly reveals that the Cane Run school, relocated on its old site, is in the most practical geographic position possible to serve the population of the area. Mr. Ramsey also pointed out that the very large concentration of students at the northern end of the zone immediately adjacent to the Louisville Independent School district were primarily black students who had moved into a newly created subdivision alongside the city boundary. Mr. Ramsey testified that with the influx of the large number of black

children from the subdivision lying alongside the city boundary, there was also a marked decrease over the last three years in the number of white children in the district. Mr. Walden's figures confirm Mr. Ramsey's testimony, since it is shown that in 1968 there were 750 white children in the Cane Run area, whereas in 1972-73 there were only 323 white children in attendance in the Cane Run area. This is, according to Mr. Ramsey, an example of the "white flight" which this Court heard so much about in the testimony of officials of the Louisville Independent School system and also may be an example of the "tip ratio" which the Louisville Independent School officials testified about at length as a phenomenon that was occurring very frequently within the Louisville Independent School district.

Mr. Ramsey also introduced a plastic overlay showing how the Jefferson County Board had under consideration the possibility of altering district zone lines in order to achieve a better racial balance. Mr. Ramsey pointed out that in 1972 HEW officials called the attention of the Board and the staff to the increasing black population in the Cane Run-Schaffner area and that the staff had under consideration, and has at this time under consideration, the possibility of redrawing school attendance zone lines so as to effectively and efficiently temporarily achieve a better racial balance.

Mr. Ramsey pointed out that the allegation of the complaint that the Board had redrawn attendance zones in the Cane Run-Schaffner area in such a way as to cause the Cane Run school to become predominantly black was in error and that in fact, when the Cane Run school was rebuilt, and for some years prior thereto, there had been no redrawing by the Board of the attendance zones. In fact, Mr. Ramsey said, the Cane Run

zone had been substantially the same for more than 20 years and that the increase in the black population was, as he previously testified, because of the influx of black students at the northern end of the zone alongside the Independent School District of Louisville where black people had moved into a subdivision that the entire community had anticipated would be primarily a white subdivision.

From the foregoing evidence and a careful study of the Exhibit 34, the Court concludes that the relocation of the Cane Run school at its former site was indeed the most practical geographical location to serve the area available for selection by the Board. Further, the Court concludes that the sudden influx of black students as described by Mr. Walden in his testimony into the Cane Run school was not an occurrence that could reasonably have been anticipated by the School Board; in view of the fact that the evidence establishes beyond question that whites abandoned the subdivision at the northern edge of the district, which in turn suddenly became occupied by an influx of black families. The departure of nearly 50% of the white students from the district within approximately three school years unfortunately confirms the testimony we have heard of the white flight. Such imbalance resulting from defacto causes, not dejure acts or failure to act.

The Faculty Segregation Issue

The plaintiffs in their complaint allege that by design or neglect the Jefferson County Board has failed to employ black teachers in sufficient numbers so that the percentage of black teachers employed by the Board approximates the percentage of black students enrolled in its schools. The allegations were that the percentage of black teachers employed by the Board in comparison

with white teachers is less today than when the Board officially operated a bi-racial school system pursuant to the requirements of state law. It was contended that within the last school year only 20 black teachers were assigned to secondary schools and that of the Board's 54 elementary school teachers, 22 were assigned to the all black Newburg elementary school and 5 were assigned to Price elementary school which is 40% black.

In support of their allegations the plaintiffs relied principally upon Jefferson County Board Exhibit #18 which shows each school in the system with the number of black teachers and the number of white teachers and Jefferson County Board Exhibit #30 which reflects the history of attempts toward faculty integration.

The Board's response to these charges consisted primarily of the testimony of Associate Superintendent Louis Laukhuf. Mr. Laukhuf testified candidly that following the Brown decision, the Jefferson County School Board and staff, like other boards and staffs across the country, were primarily concerned with pupil integration rather than faculty integration. Mr. Laukhuf admitted that it was not until the 1963 or 1964 school year when initial steps were taken by the County Board to integrate the faculty and that as a matter of fact 1965 and 1966 were the first years that a serious effort was made to integrate the Newburg faculty which had previously been all black. Mr. Laukhuf testified that during the 1966-67 school year, there were 63 black faculty members assigned to 15 different integrated faculties; that in 1967-68 there were 84 black faculty members and 27 integrated faculties; and in that year, 1967-68, the Board almost doubled the number of schools with integrated faculties. Mr. Laukhuf testified that in 1968-69 there were 89 black faculty members and

32 integrated faculties, and in 1969-70 there were 91 black faculty members in 35 integrated faculties (See Jefferson County Board Exhibit #30). Mr. Laukhuf testified that the Board and staff determined to do everything possible to further integrate the Newburg faculty and pledged to reduce the black teachers assigned to Newburg by fifty percent. The pledge was accomplished in reducing the number of black teachers at Newburg from 22 to 11 in the year 1971-72.

In the year 1972-73, the Board had recruited an additional 52 new black teachers, bringing to a total of 143 black teachers in the school system in 81 integrated faculties. The Board had set as a goal for 1972-73, 144 black teachers which would be roughly the 3.6% of the faculty which would compare to the like percentage in the student bodies in the entire system.

On cross-examination of Mr. Laukhuf by counsel for the plaintiffs, an attempt was made to show that the marked increase in the number of black teachers in the year 1972-73 was attributable solely to this litigation. However, Mr. Laukhuf testified, and he was supported by Assistant Superintendent Frank Simpson, a Negro, that vigorous efforts had been made over a sustained period of years to attract black teachers to the system and that great difficulty had been encountered in doing so, because of the reluctance of black teachers to teach in a predominantly all white school system. Mr. Laukhuf pointed out that in the year 1971-72, 25% of the black teachers recruited and apparently who signed contracts in good faith failed to report for duty.

State Action

The plaintiffs have not joined as defendants the State Board of Education, the Superintendent of Public Instruction, the Governor or Attorney General as has oc-

curred in many such suits as this, including *Bradley* v. *Milliken*, 338 F.Sup. 582 (1971).

Plaintiffs *do demand in their relief* that this Court *end state imposed segregation.* This demand was included, we assume, because in Kentucky local school districts are agencies of the state subject to the will of the legislature. The Constitution of Kentucky, Section 183, *Board of Education of Louisville* v. *Board of Education of Jefferson County, Ky.*, 458 S.W.2d 6.

The General Assembly of the Commonwealth of Kentucky has created a State Board of Education and given it certain general control of the common schools within the state. KRS 156.070 §1. The actual every day administration and control of the local school district, however, is vested in the local school board. KRS 160.160 and KRS 160.290:

> "160.160 (4399-17; 4399-18) Boards of education; nature; corporate powers.
>
> "Each school district shall be under the management and control of a board of education consisting of five members, to be known as the 'Board of Education of _____, Kentucky.' Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued, make contracts; purchase, receive, hold and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created."
>
> "160.290 (4399-20; 4399-33) General powers and duties of board.
>
> "(1) Each board of education shall have general control and management of the public schools in its district and may establish such schools and provide

for such courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the rules and regulations of the State Board of Education. Each board shall have control and management of all school funds and all public school property of its district and may use such funds and property to promote public education in such ways as it deems necessary and proper. Each board shall exercise generally all powers in the administration of its public school system, appoint such officers, agents and employes as it deems necessary and proper, prescribe their duties, and fix their compensation and terms of office.

"(2) Each board shall make and adopt, and may amend or repeal, rules, regulations and bylaws for its meetings and proceedings for the government, regulation and management of the public schools and school property of the district, for the transaction of its business, and for the qualification and employment of teachers and the conduct of pupils. The rules, regulations, and bylaws heretofore made by any governing body of a school district, or hereafter made by a board of education, shall be consistent with the general school laws of the state and shall be binding on the board of education and parties dealing with it until amended or repealed by an affirmative vote of three members of the board. The rules, regulations and bylaws shall be spread on the minutes of the board and be open to the public."

There was not one scintilla of evidence offered during the trial of our instant action to the effect that the State Board of Education, the Superintendent of Public

Instruction or the General Assembly of the Commonwealth of Kentucky has done anything whatsoever to perpetuate a dual school system, or that they have done anything to impede the desegregation effort of the local school districts within the Commonwealth of Kentucky.

Section 183 of the Constitution of Kentucky says, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." Under this broad power, the General Assembly has the authority to create, abolish, alter and do about anything they please with the local school districts as long as they do not offend some other constitutional provision of equal dignity. *Board of Education of Louisville* v. *Board of Education of Jefferson County, Ky.*, supra.

During the trial, there was some testimony about school merger. The General Assembly has provided in Kentucky for two methods for the merger of an independent school district with a county school district. KRS 160.041 and KRS 160.048. One by which two school boards may bring it about, and the other by which the people may petition boards for the transfer of property. Recognizing that local school districts are best qualified to make decisions about merger and transfer of property, the General Assembly has provided a method by which it may be done but has not demanded it.

There is of course a difference in opinion about the general desirability of school district merger. Some feel that making two districts into one will result in efficiency, and others that creating one large district will make it more cumbersome and less responsive to the people it is supposed to serve. These are matters best left to the people and their elective representatives rather than the

courts. There is also, of course, always the problem of oustanding bonded indebtedness which must be very carefully considered in any merger proposal; otherwise, the credit of the resulting district may be seriously impaired.

During the regular session of the 1972 General Assembly, KRS 160.607 was enacted. This enactment allowed the Jefferson County and Louisville school systems to increase their occupational license fee by ¼ of 1% for a period of two years only. It allowed the Louisville system to receive the first $600,000.00 collected, because it had a deficit, and otherwise provided that the balance be distributed according to KRS 160.486, or on an average daily attendance basis between both affected districts. Some members of the General Assembly wanted to condition the enactment of KRS 160.607 on the proposition of forced merger of the Louisville and Jefferson County systems. The majority, however, did not share this view and no merger section was included in this act. This action related to the earlier discussed disagreement as to the desirability of mergers generally and had absolutely no relationship to race or school desegregation.

During the regular session of the 1968 General Assembly, House Bill #297 passed in the House but failed in the Senate. This act related only to Jefferson County and called for the establishment of a metropolitan education district. It required the establishment of no fewer than five community school districts drawn in such a manner so that each district would have as nearly as possible a balanced distribution of social, economic and ethnic groups and of approximately equal pupil memberships. The act did not require the assignment of pupils to schools nor transpor-

tation to overcome racial imbalance. Thus, while the bill called for equal ratios in a particular subdistrict, it did not require equal ratios in any one given school. Therefore, it cannot reasonably be asserted or concluded that the defeat of this bill in the Senate was due to any design to prevent a mixture of the races in schools. House Bill #297 involved a radical departure from the Kentucky school structure and would have encountered serious problems as to its unconstitutionality in the Court of Appeals of Kentucky, inasmuch as it was special legislation. *Board of Education of Jefferson County* v. *Board of Education of Louisville, Ky.*, 472 S.W.2d 496 (1971).

Thus, based on the foregoing, this Court finds no evidence of any state action including, but not limited to, the Governor, General Assembly, the State Board of Education, the Superintendent of Public Instruction and the judiciary, which has resulted in the perpetuation of a dual school system, impeded desegregation of public schools in Louisville and Jefferson County or has interfered with their operation of a unitary school system.

CONCLUSION

In an attempt to determine whether or not there has been a violation of the Fourteenth Amendment rights of the plaintiffs in this action, we have carefully and meticulously studied the evidence introduced concerning which there is little or no dispute as the plaintiffs concede in their brief. We have attempted to consider this evidence in the light of the provisions of the *Brown* case and of *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 91 Sup. C. 127, 28 Law Ed. 2d, 554 (1971) and its related cases by the Supreme Court.

Brown never required anything more than a unitary school system. The decisions which followed *Brown* undertook to interpret what the Court meant as have some of the decisions since *Swann*. *Swann*, however, deals quite specifically with the duty of school authorities to eliminate racially separate schools maintained by state action and the powers of Federal Courts to order such measures as are necessary to effect complete desegregation immediately. We believe that the *Swann* opinion conclusively demonstrates that the Federal Court is precluded by Title 4 of the Civil Rights Act of 1964, 42 U.S.C Section 2,000c, and by unanimous opinions of the Supreme Court, from imposing upon school authorities the affirmative duty to cure racial imbalance in situations where that imbalance is caused by de facto segregation. Conversely, we believe that it is apparent that it is the duty of school boards to come forward with a plan that promises realistically to work in those cases in which it can be demonstrated that there are vestiges of state imposed segregation maintained by the boards' action, policies or inactivity. *Swann* plainly teaches that school authorities may indeed have the power to formulate and implement education policy which would include a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. But *Swann* says plainly:

> "To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a Federal Court."

Since it is obvious that the Jefferson County School system was a dual system by requirement of state law, the first remedial responsibility of the school authorities

was to eliminate invidious racial distinctions. This, we believe, the Board undertook to do and has successfully accomplished. In doing so, the Board has considered and acted upon such matters as transportation, supporting personnel, the closing of certain all-black schools, the erection of new schools and normal administrative practices calculated to produce schools of like quality, facilities and staffs. Although plaintiffs, in their complaint and in the evidence, complained of the faculty assignment, in a footnote to their brief, they recognize the effort on the part of the Board in the most recent school years to increase the number of black teachers and therefore state they *no longer seek relief in this respect.*

The pattern of school construction which the evidence reveals in this case does not, in our opinion, demonstrate a policy of the Board to maintain a state segregated school system but, on the contrary, demonstrates a desire on the part of the Board of Education to increase wherever possible the number of integrated schools within the system and to integrate the all-black school at Newburg.

Swann specifically holds that if a District Court requires as a matter of substantive constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and the Supreme Court would be obliged to reverse. The Court states:

> "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

Recognizing as we do that schools predominantly of one race in a district of mixed population require close scrutiny to determine that school assignments are not

part of state enforced segregation, we nevertheless recognize that the Supreme Court determined the existence of some small number of one race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law.

We have closely scrutinized the situation at the Newburg school and the adjoining elementary schools and the Cane Run school about which plaintiffs complain. We have seen the efforts by the school board in these areas and the use of permissible tools employed by the Board and we reject as totally unrealistic the contentions of the plaintiffs that it is necessary, in order to comply with constitutional mandate, to transport white children into the Newburg area from adjoining districts, and at the same time transport some of the Newburg children who live near the school to white schools, thus cross-busing or leap-frogging these children merely in order to achieve some sort of racial balance, absent de-jure acts or failure to act by the authorities.

We believe that the school officials have been aware of the responsibilities imposed upon them by the advancing state of the law as it has developed by the courts since *Brown*. We believe that they have undertaken to comply with the letter and the spirit of the law and that there is not at this time any constitutional violation of the rights of the plaintiffs or any other children in the Jefferson County school system *and that the system is a unitary system.*

From what we have said hereinabove, it follows that we need not consider further the principal claims of the intervening plaintiffs which are that there can be no complete elimination of vestiges of state imposed segregation in the Jefferson County system and the

Louisville system unless such systems are merged in whole or in part.

Accordingly, it is now ORDERED AND ADJUDGED:

1. That the plaintiffs' complaint, the intervening complaint and the second intervening complaint as it relates to the Jefferson County Board of Education and its Superintendent, Richard Van Hoose, be and the same are hereby dismissed with prejudice.

2. That the Board of Education of Jefferson County, Kentucky and its Superintendent, Richard Van Hoose, are operating a unitary school district.

3. That the defendant shall have its costs herein expended for which execution may issue.

4. This is a final judgment and there is no just reason for delay.

Dated: March 8, 1973

JAMES F. GORDON
United States District Judge

Opinion, United States Court of Appeals, Sixth Circuit, Haycraft, et al. v. Board of Education of Louisville, Kentucky et al.

Nos. 73-1403, 73-1408

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 73-1403

NEWBURG AREA COUNCIL, INC., et al. *Plaintiffs-Appellants*

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. *Defendants-Appellees*

No. 73-1408

JOHN L. HAYCRAFT, et al. *Plaintiffs-Appellants*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al. *Defendants-Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Decided and Filed December 28, 1973.

Before: PHILLIPS, Chief Judge, McCREE AND MILLER, Circuit Judges.

MILLER, Circuit Judge. This is an appeal from a dismissal by the district court of two class actions concerning school desegregation in Jefferson County, Ken-

tucky. In *Newburg Area Council, et al.*, v. *Board of Education of Jefferson County*, No. 73-1403, the plaintiff challenged certain practices of the Jefferson County School Board with respect to its elementary schools. Later another action, *Haycraft, et al.*, v. *Board of Education of Louisville, Kentucky et al.*, No. 73-1408, was filed against the Louisville Board of Education and the Jefferson County Board of Education, seeking the desegregation of the Louisville school system with a plan that included disregarding the Louisville and Jefferson County School District boundaries. The two suits were consolidated but the Court directed separate trials as to the status of each district.

The district court dismissed both actions, holding that the Jefferson County School District and the Louisville Independent School District are unitary systems in which all vestiges of state-imposed segregation have been eliminated. The actions have been consolidated for appeal.

We decide three issues on this appeal: (1) Whether the district court erred in holding that the Jefferson County School District is a unitary system in which all vestiges of state-imposed segregation have been eliminated; (2) whether the district court erred in holding that the Louisville Independent School District is a unitary system in which all vestiges of state-imposed desegregation have been eliminated; and (3) whether a federal district court has the power to disregard school district lines within a single county in formulating a school desegregation plan.

The Jefferson County School District embraces all of Jefferson County except that portion included within the Louisville Independent School District and the

Anchorage Independent School District[1]. It has close to 96,000 students, approximately 4% of whom are black. 65% of all students are bussed to the schools they attend. The Board operates 74 elementary schools, 5 middle schools, 18 combined junior and senior high schools, and 6 special schools.

Prior to the decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), the Board maintained a racially-segregated school system in accordance with the requirements of Kentucky law. It did not provide a high school for black students and arranged for their attendance at Central High School, the black high school operated by the Louisville Board of Education. It operated the Newburg Elementary school, grades 1-9. Newburg was located in the one area in the county outside of Louisville having any substantial black population. It was a pre-*Brown* black school, and has remained black until the present day. Newburg is surrounded by a number of all-white or virtually all-white elementary schools. Within a distance of three miles from Newburg, there are, in addition to Price Elementary School, which will be discussed subsequently, nine substantially white elementary schools.

In 1969 Price Elementary School was constructed within a mile of Newburg. When Price opened in 1969-70, 33.1% of the students were black. The percentage increased to 40.2% during 1970-71, to 43.9% during 1971-72, and now stands at 54.3%. It is practically an all

[1] The Anchorage School District is a very small school district operating only one elementary school located in the southeast portion of Jefferson County. It is an all-white enclave. The plaintiffs in the *Haycraft* case sought to join the Anchorage School District and its Superintendent as parties defendant. When the district court ruled in a pretrial order that it did not have the power to cross school district lines, it dismissed the proceedings against the Anchorage District and its Superintendent. As we point out later, the Anchorage District must be rejoined in the action.

walk-in school, with about 3% only of the pupils being bussed.

Cane Run Elementary School is located in the northwest portion of the District close to the Louisville city limits. In 1966-67 the black student population of Cane Run was 1.2%. In 1967-68 it increased to 6.2%, in 1968-69 it increased to 11.5%, in 1969-70 it increased to 25.5%, in 1970-71 it increased to 36.7% and in 1971-72 to 45.5%. In 1972-73 it stood at 49%. Cane Run was rebuilt on the same site during 1972.

The evidence shows that Newburg, Price and Cane Run contain 56% of the black elementary students in the Jefferson County School District.

The district court held that the existence of an all black school, Newburg, in the Jefferson County School District was not unconstitutional. The Supreme Court stated in *Swann* v. *Charlotte Mecklenburg School District*, 402 U.S. 1, 26 (1971), that the "existence of some small number of virtually one race schools within a district is not in and of itself the mark of a system that still practices segregation."

As this Court noted in *Northcross* v. *Board of Education of Memphis City Schools*, 466 F.2d 890, 893 (6th Cir. 1972), this language in *Swann* is "obviously designed to insure that tolerances are allowed for practical problems of desegreation where an otherwise effective plan for dismantlement of the school system has been adopted." The Jefferson County School District thus has three elementary schools that either are or are rapidly becoming "racially identifiable." As stated, Newburg School, a pre-*Brown* black school, is racially identifiable, while Price and Cane Run Schools are rapidly becoming racially identifiable as black schools. The duty of the school district is to "eliminate from the

public schools all vestiges of state-imposed segregation." *Swann, supra,* 402 U.S. at 15. Unitl the dual system is eliminated "root and branch," *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), the school district has not conformed to the constitutional standard set forth by *Brown* nearly 19 years ago.

The Board urges that "white flight," not school board policies, has been responsible for the shift in the racial composition of the Price and Cane Run Schools. The district court found that the attendance zone for Cane Run had remained constant over the years and that as blacks moved into the attendance area, the school would naturally become "blacker," particularly since whites would "flee." Although the decisions with respect to Cane Run attendance zone and the rebuilding of Cane Run on the same site, considered alone, might not compel the conclusion that the Board fostered segregation here, its decision with respect to Cane Run must be related to the circumstances surrounding the Newburg and Price Schools.

The evidence shows that in 1969-70 Price opened with an enrollment of 560 and a capacity of 756. Newburg, with a capacity of 1242 had an enrollment of 620. Although these schools were underutilized, several "racially identifiable" white schools were operating with enrollments greater than capacity using either portable classrooms or operating double shifts. During the 1972-73 school year Newburg's enrollment had declined to 340, and Price's had declined to 620, while some of the nearby "white" schools were operating with over capacity. The district judge found no significance in the underutilization of nearby white schools. Instead he found that the Board was trying to achieve integration in

assigning some black students in the area to nearby white schools without determining why white students in the area were not assigned into Newburg and Price. All vestiges of state-imposed segregation have not been eliminated so long as Newburg remains an all black school. Where a school district has not yet fully converted to a unitary system, the validity of its actions must be judged according to whether they hinder or further the process of school desegregation. The School Board is required to take affirmative action not only to eliminate the effects of the past but also to bar future discrimination. *Green, supra*, 391 U.S. 438 n. 4; *Robinson* v. *Shelby County Board of Education*, 442 F.2d 255, 258 (6th Cir. 1971). Since the Jefferson County Board has not eliminated all vestiges of state-imposed segregation from the system, it had the affirmative responsibility to see that no other school in addition to Newburg would become a racially identifiable black school. It could not be "neutral" with respect to student assignments at Price or Cane Run. It was required to insure that neither school would become racially identifiable.

A school system that has had a history of state-imposed segregation has not fully converted to a unitary system when 56% of all of its black elementary students attend three out of seventy-four elementary schools. This is particularly so when these schools are surrounded by several all-white or virtually all-white schools.

The Louisville School District is an independent school district established in accordance with the requirements of Kentucky Revised Statutes 160.160, which provides for independent school districts within a county. It is situated within the City of Louisville, a city of the first-class in Jefferson County, Kentucky, but its

boundaries are not co-terminous with the political boundaries of the City of Louisville.[2] Approximately 10,000 children, mostly white, live between the boundaries of the Louisville School District and the outer boundaries of the City of Louisville. The total enrollment of the Louisville School District at the commencement of the 1972-73 school year was 45,570 pupils, of whom 22,367 were white, and 22,933 were black. The trend is definitely toward "white flight." During the 1956-57 school year, there were 45,841 children enrolled of which 12,010 were black and 33,831 were white. Thus, from 1956 to the present time, the white enrollment has decreased by approximately 11,000 pupils, and the black enrollment has increased by the same number.

Prior to the decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), the Louisville Board of Education operated a racially-segregated school system in accordance with the requirements of Kentucky law. The Board put a plan of pupil desegregation into operation at the commencement of the 1956-7 school year. The plan consisted of geographic attendance zones with an open transfer provision. Parents were sent forms to indicate a first, second, and third choice of transfer school. In the absence of a parental transfer request, the pupils were required to attend schools within their assigned zones.

At the commencement of the 1972-73 school year, the Board was operating six academic high schools, thirteen junior high schools and forty-six elementary schools.[3]

[2] An independent school district's boundaries do not expand with the boundaries of the city by which it is embraced. Annexation for educational purposes must be considered independently of annexation for the expansion of the city. *Spragens* v. *Thomas*, 308 Ky. 97, 213 S.W.2d 452 (1948).

[3] In addition the Board operates two vocational schools, a residential manpower center in Shelby County Kentucky, and a three-level school for gifted children.

Three of the six academic senior high schools, Central, Male and Shawnee, have between 94% and 100% black students. Central was a pre-*Brown* black school. Male and Shawnee were pre-*Brown* white schools. Two of the senior high schools, Atherton and Iroquois, have 97% and 99% white students. The sixth school, Manual, which shares a common attendance zone with Central and Male, has 40% black students. Atherton and Manual were pre-*Brown* white schools, and Iroquois was constructed after 1956.

There are thirteen junior high schools. Five of them, DuValle, Meyzeek, Parkland, Russell, and Shawnee, have between 95% and 100% black students. Four of them, Barrett, Gottschalk, Highland and Southern, have between 94% and 99.5% white students. The remaining four, Manly, Manual, Western and Woerner, have between 25% and 64% black students. DuValle, Meyzeek and Russell were pre-*Brown* black schools; Parkland, Shawnee, Bartlett, Highland, Southern, Manly, Manual, Western and Woerner, were pre-*Brown* white schools. Gottschalk was constructed after 1956.

There are forty-six elementary schools. Nineteen have between 82% and 100% black students. Twenty-one have between 89% and 100% white students. The remaining six have between 16% and 55% black students. The twenty-one schools that have between 89% and 100% white students, were pre-*Brown* white schools.

A large number of racially identifiable schools in a school district that formerly practiced segregation by law gives rise to a presumption that all vestiges of state-imposed segregation have not been eliminated. *Swann, supra.* This shifts the burden to the School Board to prove that the racially-identifiable character of the

schools is not in any way the product of past or present discriminatory conduct on its part. *Northcross* v. *Board of Education of the Memphis City Schools*, 466 F.2d 890 (6th Cir. 1972). In Northcross this Court said:

> "It is the defendant School Board's contention that notwithstanding the fact that some 79% of its schools have an essentially monolithic racial structure it has satisfactorily cured the violation of law involved in its past *de jure* segregation and has, in fact, established a unitary school system. We cannot accept this contention."

Id at 893.

Although we are cognizant of the Board's caveat against playing the "numbers game," statistics do provide an invaluable source of information for analysis and comparison. The evidence indicates that over 80% of the schools in Louisville are racially identifiable. As in *Northcross*, the effectiveness of the Board's purported desegregation "can be gauged by a quick look at the vital statistics of the (school) system as it now exists." Id. at 892. An examination of these statistics establishes that five out of the six academic senior high schools, nine out of the thirteen junior high schools and forty out of the forty-six elementary schools are racially identifiable schools. As previously mentioned, fifty-six of the sixty-five academic senior high schools, junior high schools and elementary schools currently operated by the Board were in operation prior to *Brown* as legally-segregated schools.[4] Thirty-five of these fifty six schools have never changed their racial composition. Regardless

[4] The pattern of school construction and site selection since *Brown* has closely followed the "neighborhood school" concept. However, of the nine new schools constructed since *Brown* six were racially identifiable with respect to student composition upon opening.

of any explanation for the racial composition of any of the other schools in the system, the thirty-five pre-*Brown* schools that have retained their pre-*Brown* racial identification to the present day stand out as clear vestiges of state-imposed segregation. The Board must show that the racial composition of these schools is not the result of past discriminatory action on its part. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 26. This it has not done. However laudable their motives and intentions, the Board's desegregation plan has not been effective. Motivation is not the controlling factor. *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972). The geographic zone assignment or "neighborhood school system" adopted by the Board, as mentioned earlier, was modified by a transfer provision. Since the pre-*Brown* white schools were generally in white residential areas and the pre-*Brown* black schools were generally in black residential areas, geographic zoning would cause these schools to retain their former racial identification. The transfer provision would enable whites who were assigned to pre-*Brown* black schools to transfer out. It also enabled blacks who were apprehensive about going to pre-*Brown* white schools to return to the black schools with which they were familiar.

The Board urges that changing residential patterns in the Louisville School District has contributed to the continued existence of racially identifiable schools. However, population shifts that changed the racial composition of some schools does not affect the Board's duty to convert fully to a unitary school system. *See Kelly* v. *Metropolitan County Board of Education*, 463 F.2d 732, 744 (6th Cir.) *cert. denied*, 409 U.S. 1001 (1972). This duty has never been fully met.

Geographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation if it does not work. The measure of any plan is its effectiveness in accomplishing desegregation. *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). Because of the residual effects of past discrimination, the Louisville zoning assignment plan has not been effective despite the good intentions of the school board. As the Supreme Court stated in *Swann:*

> "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation . . . "

402 U.S. at 28.

For the reasons mentioned, we find that the district court erred in holding that the Louisville Independent School District is a unitary system in which all vestiges of state-enforced discrimination have been eliminated.

Intervening plaintiffs, black and white citizen parents, filed complaints seeking desegregation of the Louisville Independent School System, and as part of the desegregation they sought the merger of the Louisville system with the Jefferson County School District and the Anchorage Independent School District, to insure complete desegregation of the entire county. The district court in dismissing the action against Anchorage, stated:

> "Prior to the trial hereof, we entered certain threshold orders, to the effect that this Court lacked

> the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage Schools Districts, and, since the Anchorage School District (a very small school district located in the northeast portion of the county) was totally white, the Court, by final order with respect thereto [dismissed the action as to Anchorage].

The court below relied on *Bradley* v. *School Board, City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), (aff'd U.S. (1973) by an equally divided court), in holding that the court had no judicial power to cross political boundaries in this case. The court's reliance on *Richmond* was misplaced. In *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973), *cert. granted* U.S. (1973), this Court held that a federal court is not restrained by state-created political boundaries in formulating a constitutionally acceptable desegregation plan. The present case is clearly distinguishable from *Richmond*. In *Richmond*, the rejected desegregation plan involved consolidation of three school systems, even though each district was a unitary system. In the present case, both the Louisville Independent School District and the Jefferson County School District are not operating unitary school systems. *Milliken* involved the power of district courts to disregard state-created school district lines in order to achieve a unitary system in Detroit.

There is nothing so sacrosanct about the school district lines in this case that they may be permitted to curtail the broad equity powers of the federal court in implementing a mandate of the federal Constitution. If it were otherwise the supremacy clause of our fundamental charter would be a dead letter and we would revert to

the "state sovereignty" principle of the long discarded Articles of Confederation. The school district lines have been disregarded in the past in conforming to state-enforced segregation. For example, in pre-*Brown* days, black high school students in the Jefferson County system attended Louisville's Central High School on a tuition basis.

The crossing of school district lines in this case involves only a single county, the basic educational unit in Kentucky. Where there are separate school districts in a single county and the districts are not unitary systems, a federal district court may fashion an appropriate remedy without being constrained by school district lines created by state law. *Cf. Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972); *United States* v. *Scotland City Board of Education*, 407 U.S. 484 (1972); *Lee* v. *Macon County Board of Education*, 448 F.2d 746 (5th Cir. 1971).

For the reasons stated herein, the judgments of the district court are reversed. The case is remanded to the district court for proceedings to formulate a desegregation plan for all school districts in Jefferson County, Kentucky. The district court should join all necessary parties including the previously dismissed Anchorage Independent School District. By whatever means the district court deems appropriate in the exercise of its equity powers, see *Brown* v. *Board of Education*, 349 U.S. 294 (1955), all vestiges of state-imposed segregation must be eliminated within each school district in the county. To accomplish such purpose, state-created school district lines shall impose no barrier. We do not require use of any particular method nor approve in advance the use of any particular device. Any plan of desegregation is to be effective for the 1974-75 academic year.

No. 73-1403
No. 73-1408

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEWBURG AREA COUNCIL, INC., et al.
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al.,
Defendants-Appellees.

JOHN L. HAYCRAFT, et al.,
Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, et al.,
Defendants-Appellees.

ON APPEAL From the United States District Court for the Western District of Kentucky.

DECIDED AND FILED DECEMBER 11, 1974.

Before: PHILLIPS, Chief Judge, and McCREE and MILLER, Circuit Judges.

PER CURIAM. These consolidated school desegregation cases were originally before this Court in *Newburg Area Council, Inc., et al.* v. *Board of Education of Jefferson County, Kentucky, et al.*, and *John L.*

Opinion, United States Court of Appeals, Sixth Circuit
Dated December 11, 1974

Haycraft, et al. v. *Board of Education of Louisville, Kentucky, et al.*, 489 F.2d 925 (1973), in which it was held:

(1) That neither the Independent Louisville School District nor the Jefferson County School District was a unitary system, both operating dual school systems from which all vestiges of state-imposed segregation had not been eliminated; and (2) That all vestiges of state-imposed segregation must be eliminated within each school district in the county, state-created school district lines to impose no barrier in accomplishing such purpose.

The judgment of the district court, dismissing the action as to the Louisville and Jefferson County school districts, was reversed and the actions were remanded for further proceedings, with the statement that to accomplish the elimination of remaining vestiges of de jure segregation, "we do not require the use of any particular method nor approve in advance the use of any particular device."

The petitions of the defendant School Boards for certiorari were granted and on July 25, 1974, the Supreme Court entered the following order:

> The petitions for writs of certiorari are granted. The judgments are vacated and the cases are remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Milliken* v. *Bradley*, ___ U.S. ___ (1974). Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice White and Mr. Justice Marshall would grant certiorari and without briefing or oral argument affirm the judgments.

By this Court's order of August 8, 1974, the parties were directed to file supplemental briefs addressed to all questions applicable to the reconsideration by this Court of its prior opinion and ruling of December 28, 1973. Thereafter, extensive briefs were filed by the par-

ties and the actions were set down for hearing on oral argument on October 14, 1974.

After full reconsideration, pursuant to the order of remand of the Supreme Court and its ruling in *Milliken* as to interdistrict remedies, we are of the opinion that our prior ruling was correct and that it should be and it is hereby reaffirmed.

At the outset, we construe the Supreme Court's opinion in *Bradley* v. *Milliken*, 42 USLW 5249, July 25, 1974, and its order of remand in the present cases, as in no way requiring a reconsideration of our prior opinion insofar as it held that both the Louisville and Jefferson County school districts were operating dual school systems from which all vestiges of state-imposed segregation had not been eliminated as required by law.

Therefore, in this opinion, we address ourselves only to our prior holding that the district judge in approving or formulating a plan of desegregation for Jefferson County, Kentucky, would have the power to require that state-created school district lines could be disregarded. On this issue, we find that there are material and controlling distinctions between the facts of the present cases and the facts before the Supreme Court in *Milliken*, in which the court held that state-created district lines could not be disregarded in devising an appropriate desegregation plan for the City of Detroit only:

(1) A vital distinction between *Milliken* and the present cases is that in the former there was no evidence that the outlying school districts had committed acts of de jure segregation or that they were operating dual school systems. Exactly the opposite is true here since both the Louisville and Jefferson County School Districts have been expressly found by this Court to have failed to eliminate all vestiges of state-imposed segregation. Consequently, as contrasted with the outly-

ing Michigan Districts, they are guilty of maintaining dual school systems.

(2) In *Milliken*, the metropolitan remedy would have involved some 53 school districts spreading over three counties, while the present cases involve only two and possibly three districts in a single county.[1] Hence, the inter-district remedy in this case would not be likely extensively to disrupt and alter the structure of public education in Kentucky, or even in Jefferson County, nor require the creation of a vast new super school district, as may have resulted from the broad metropolitan remedy considered in *Milliken*.

(3) In Kentucky, the county is established as the basic educational unit of the state, [Ky. Rev. Stat. §160.010], and the state legislature has referred to the boundaries of school districts as "artificially drawn school district lines." Ky. Rev. Stat. §160.048(1). Statutes of this character were not in effect in Michigan and consequently were not considered by the Supreme Court in *Milliken*.

(4) In *Milliken*, the Supreme Court expressed some concern because of the serious administrative problems

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[1]The third district in the present cases is the Anchorage School District, a very small district operating only one elementary school and located in the southeast portion of Jefferson County. The plaintiffs in the *Haycraft* case sought to join this district and its superintendent as parties defendants. When the district court ruled in a pre-trial order that it did not have the power to cross school district lines, it dismissed the proceedings against the Anchorage District and its superintendent. Since no appeal was taken from this order, it was argued on behalf of the Anchorage School District that the court was without authority to direct the district judge to reinstate the case as to Anchorage. Nevertheless, we remain of the view that the district court in passing upon any plan for desegregating the schools of Jefferson County may, on his own motion, if deemed to be required, join any necessary party in order to accomplish complete relief. If, on remand, the district court should be of the opinion that the Anchorage School District should be made a party defendant, he may appropriately have the district so joined under conditions which will afford it a full opportunity to be heard with respect to any finding or order affecting its interests.

which could arise in Michigan if the Court should decree an inter-district remedy entailing the consolidation of a large number of separate school districts. In Kentucky, however, if the district court should find that a formal consolidation or merger of districts was required to effectuate an effective desegregation plan for the county as a whole, such administrative problems would to a large extent be obviated since the merger or consolidation in that state could be effectuated under the express provisions of a Kentucky statute. This statute authorizes the reconsolidation of school districts within a single county even without the consent of the county school board. Ky. Rev. Stat. §160.041.

(5) A crucial difference between the present cases and *Milliken* is that school district lines in Kentucky have been ignored in the past for the purpose of aiding and implementing continued segregation. Such disregarding of school district lines continues to have an effect on racial imbalance in the county's schools, particularly in the location of Atherton High School in the county and away from the core city of Louisville. For example, in pre-*Brown* days black high school students in the Jefferson County school district were sent to the black Central High School located in the Louisville school district. This was done because the county had no black high school, and it was done on a tuition basis paid by the county. While this action by itself might be insufficient to invoke the equitable power of the court, *see* 42 U.S.L.W. at 5259, there are other instances in the present case of disregarding school district lines. Atherton High School is an example. Atherton is a high school belonging to the Louisville school district, but it was and is located outside the boundaries of that district and within the territory of the Jefferson County school district. Students from both school districts have been per-

mitted to attend the school. Further, while in *Milliken* only two of 52 potentially affected school districts were involved in crossing district lines, the present cases involve at least two of the three school districts, and by far the two largest districts, located in the geographical boundaries of Jefferson County. Thus, in the present cases the disregarding of school district lines in a single county in Kentucky cannot be characterized as a mere isolated instance, as was the case in *Milliken* with respect to the Carver-Detroit high school situation.

(6) The Louisville school district is an independent school district established in accordance with the requirements of Ky. Rev. Stat. §160.020, which provides for independent school districts within a single county. It is located within the City of Louisville, but its boundaries are not coterminous with the political boundaries of that city since the boundaries of an independent school district in Kentucky do not expand with the boundaries of the city in which it is embraced. As pointed out in our prior opinion, approximately 10,000 children, mostly white, live between the outer boundaries of the Louisville school district and the boundaries of the City of Louisville. Such a large number of white students who are resident within the City of Louisville, but are required to attend county schools administered by the Jefferson County school district, materially aggravates the difficulties in disestablishing the dual city school system.

We conclude in view of these factors that the school district lines in Jefferson County, Kentucky, have been crossed for the purpose and with the actual effect of segregating school children among the public schools of the county on the basis of race.

We are not confronted here with the problem in *Milliken* in which the remedy approved by the Court of

Appeals was broader than the constitutional violation. Rather, the situation presented is that of two districts in the same county of the state being equally guilty in failing to eliminate all vestiges of segregation mandated by the same Kentucky statute. Before its repeal sometime after the ruling in *Brown I*, Sec. 158.020 of the Ky. Rev. Statutes provided:

> (1) Each board of education shall maintain separate schools for the white and colored children residing in its district.
>
> (2) No person shall operate or maintain any college, school or institution where persons of both the white and colored races are received as pupils.
>
> (3) No instructor shall teach in any college, school or institution where persons of both the white the colored races are received as pupils.
>
> (4) No white person shall attend any college, school or institution where colored persons are received as pupils or receive instruction.
>
> (5) No colored person shall attend any college, school or institution where white persons are received as pupils or receive instruction. * * *

In *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972), and in *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972), the Supreme Court refused to permit the establishment of separate school districts within a single county, even though authorized by state law, where it was found that this would impede the process of dismantling a segregated school system. By analogy no justification appears for permitting the city and county school districts in Jefferson County to remain completely autonomous if the effect is to impede the process of desegregating the schools of the county as a whole.

Opinion, United States Court of Appeals, Sixth Circuit
Dated December 11, 1974

Accordingly, after full reconsideration as directed by the Supreme Court, our opinion of December 28, 1973, is hereby reinstated with the modifications (1) that the district court shall join the Anchorage School District as a party defendant if deemed necessary to provide an adequate remedy; (2) that the effectiveness of any order entered by the district court on remand which may provide for an inter-district remedy shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired; and (3) that in no event shall any further plan of desegregation ordered by the district court take effect before the beginning of the 1975-76 academic year.

Resolution of Board of Education of Louisville, Kentucky, Dated December 28, 1973

RESOLUTION OF BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY
Dated December 28, 1973

SPECIAL MEETING
BOARD OF EDUCATION
December 28, 1973

ITEM I

The Board of Education met in special session at 12 noon on Friday, December 28, 1973, in the Louis XVI Room at the Brown Education Center.

The following Board members were present:

Mr. Scott Detrick, Chairman
Dr. Joyce Howell, Vice-Chairman
Mr. Carl R. Hines
Mrs. Carolyn G. Hutto

Absent: Dr. John P. Bell

Members from the staff were:

Dr. Newman Walker, Superintendent
Dr. Roy H. Forbes, Director, Louisville Urban Education Center
Mr. Charles W. Grissett, Chairman, Department of Business Affairs
Mr. Milburn T. Maupin, Chairman of School Operations
Dr. Martin McCullough, Chairman, Department of Instructional Programs

Other:

Mr. Henry A. Triplett, Board Attorney.

ITEM II

The Board met for the purpose of discussing the decision of the Sixth Circuit Court of Appeals in connection with

the suit filed against the Louisville Board of Education and the Jefferson County Board of Education (Haycraft, et al, v. Board of Education of Louisville, Kentucky, et al, No. 73-1408).

Mr. Triplett reviewed the text of the decision of the Sixth Circuit Court of Appeals relating to the desegregation case. After considerable discussion, and upon the Superintendent's recommendation, the following statement was adopted by the Board:

> The Board of Education of Louisville, Kentucky has received the findings of the Sixth Circuit Court of Appeals in which a federal district court decision involving the Board was reviewed.
>
> At this point, it appears to the Board that the Court of Appeals has provided the mechanism to sustain the Board's long held position relating to school desegregation—that it must be dealt with on a metropolitan basis rather than within the geographic boundaries of the several individual school systems within Jefferson County. Any further legal action will be initiated by this Board only for the purpose of protecting this concept.
>
> We stand ready to cooperate with, and seek the support of other boards of education, other citizens and community leaders in developing plans for the maximum benefit of the children of this area.

The motion for adoption was made by Mrs. Hutto, seconded by Mr. Hines, and all Board members present voted affirmatively. The motion was read to Dr. Bell over the telephone and he concurred.

Resolution of Board of Education of Louisville, Kentucky, Dated December 28, 1973

The meeting adjourned at 4:30 p.m.

I, MILBURN T. MAUPIN, certify that the above statement was approved by the Board of Education of Louisville, Kentucky at a special meeting held on December 28, 1974.

/s/ Milburn T. Maupin
Milburn T. Maupin, Secretary

(SEAL)

OPENING STATEMENT FOR PLAINTIFFS BY MR. SEDLER

MR. SEDLER: The theory of our case in regard to the Louisville Board of Education is that the Board has never achieved a unitary system, that is, beginning with the purported desegration in 1956 to the present.

The Board has never achieved the elimination of all vestiges of state-imposed segregation and the system, beginning in 1956, and continuing to the present, consists largely of racially identifiable schools.

By "racially identifiable schools", we mean schools having a large percentage of students of one race—generally, at least ninety percent students of one race—generally having a much larger proportion of faculty of that race and, generally, having a principal of that race.

We are not contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the Court indicated that those factors would be taken into account. We are proceeding on the supposition that the quality of the

Black schools is substantially the same as the quality of the White schools and that the same kind of program is offered.

SPECIAL meeting of the Jefferson County Board of Education was held in the law offices of Woodward, Hobson and Fulton, Attorneys, Kentucky Home Life Building, 239 South Fifth Street, Louisville, Kentucky, on January 6, 1975 at 1:30 p.m.

MEMBERS PRESENT:

Roberta B. Tully, Chairman
Don M. Randolph, Vice-Chairman
Orville R. Miller, Jr.
Fred Pfannenschmidt, Jr.
Jean Ruffra

OTHERS PRESENT:

E. C. Grayson, Superintendent
James E. Farmer
Marie Doyle
Vito Brucchieri
Clyde Caudill
Rose Abel
John Fulton, Attorney
Will Fulton, Attorney
Preston Young, Attorney

Under provisions of KRS 61.110, an in depth discussion was held of pending and proposed litigation on behalf of the Jefferson County Board of Education relative to desegregation and merger.

Minutes of Special Meeting of Jefferson County Board of Education

MOTION #9082

It was moved by Don M. Randolph, seconded by Fred Pfannenschmidt, Jr., that legal counsel be authorized to enter a Writ of Certiorari to the U. S. Supreme Court against the 6th Circuit Court ruling of December 11, 1974. Said Writ to be filed on or before March 11, 1975.

Upon roll call, the vote on the motion was as follows:

Roberta B. Tully	YES
Don M. Randolph	YES
Jean Ruffra	YES
Orville R. Miller, Jr.	YES
Fred Pfannenschmidt, Jr.	YES

(Motion carried)

Meeting adjourned at 3:05 p.m.

CHAIRMAN

SECRETARY

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MAR 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1122

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and
ERNEST GRAYSON - - - - - Petitioners

versus

NEWBURG AREA COUNCIL, INC.,
SARAH WHITE,
JOHNIE WRIGHT and
SUZANNE POST - - - - - - Respondents

AND

BOARD OF EDUCATION OF LOUISVILLE KENTUCKY, and
BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY - - - Petitioners

versus

JOHN E. HAYCRAFT and
HAZEL K. LANE - - - - - - Respondents

(Other parties respondent on inside cover)

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN A. FULTON
WILL H. FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Respondents, Jefferson County Board of Education

E. PRESTON YOUNG
722 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Petitioners, Jefferson County Board of Education

WESTERFIELD-BONTE CO., INC., 419 W. KENTUCKY, LOUISVILLE, KY.

Additional Respondents in Board of Education v. Newburg:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, Theresa Black, John Schmidt, Earl Alluisi, and American Federation of Teachers

Additional Respondents in Board of Education of Jefferson County and Board of Education of Louisville versus Haycraft:

Lyman Johnson, Richard Miller, Aaron Howard, John R. Hughes, John Schmidt, Earl Alluisi, and Louisville and Jefferson County Federation of Teachers, Local 672, Newburg Area Council, Inc. and Kentucky Human Relations Commission.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

JOHN E. HAYCRAFT, et al.

vs.

BOARD OF EDUCATION OF JEFFERSON CO., KY., et al.

} Civil Action No. 7291-G

AND

NEWBURG AREA COUNCIL, INC., et al.

vs.

BOARD OF EDUCATION OF JEFFERSON CO., KY., et al.

} Civil Action No. 7045-G

ORDER—Entered October 18, 1972.

This cause came on for a pre-trial conference as directed by the Court on September 6, 1972. The plaintiffs, John E. Haycraft and Hazel K. Lane, were represented by Robert A. Sedler, John G. O'Mara, Darrel T. Owens and Charles Lunderman. The Intervening Plaintiffs, Lyman Johnson, Richard Miller, Barbara Byrd, Aaron Howard, John R. Hughes, Teresa Black, John Schmidt and Earl Alluisi were represented by Thomas L. Hogan and Galen Martin. The Louisville and Jefferson County Federation of Teachers, Local 672, Second Intervening Plaintiffs, were represented by William Friedlander and James Webb. The Plaintiffs, Newburg Area Council, Inc., Mrs. Sarah White, Mrs. Johnie Mae Wright and Mrs. Suzanne Post, were represented by Robert A. Sedler, John G. O'Mara, and Thomas L. Hogan.

The Defendant, Board of Education of Jefferson County, Kentucky was represented by E. Preston Young, John A. Fulton, and William A. Blodgett. The Defendant, Louisville Board of Education was represented by Henry Triplett. The Defendant, Board of Education of Anchorage, Kentucky, was represented by J. Donald Dinning. There also appeared Fred Amis, Contenders of the Faith, Louisville Christian Civil League and Veterans Christian Union by their attorney, James T. Robertson, who tendered an Intervening Complaint and sought permission to file same. The Court having considered the record and the statements of counsel and being otherwise sufficiently advised,

IT IS ORDERED:

1. The Motion of Fred Amis, Contenders of the Faith, Louisville Christian Civic League and Veterans Christian Union to intervene as plaintiffs is DENIED. In the event these parties desire to do so, they are hereby authorized to file an amicus curiae brief urging any contentions which these parties seek to assert.

2. Civil Actions Nos. 7291-G and 7045-G are consolidated for the purpose of trial and the order of trial shall be that the plaintiffs shall introduce evidence relative to their claim against the Board of Education of Louisville, Kentucky, whereupon the Board of Education of Louisville, Kentucky, shall introduce such evidence as it deems desirable; and thereupon the plaintiffs shall introduce their evidence relative to the Board of Education of Jefferson County, Kentucky, following which the Board of Education of Jefferson County, Kentucky shall introduce its evidence.

3. With reference to the relief demanded in the various intervening complaints seeking a merger of the City and the County and the Anchorage School systems or some alternative relief involving consolidation or amalgamation of various school districts, the Court finds as a matter of law that it has no power or authority to cross political boundaries for the purpose of granting the relief sought in the

various intervening complaints. For the foregoing reasons, the Court is of the opinion that to the extent that such complaints or intervening complaints seek to require this Court to ignore political boundaries for the purpose of effecting integration of or racial balance in the various school systems, the complaints fail to state a claim for which relief may be granted. For the foregoing reason, all claims which are asserted against the Board of Education of Anchorage, Kentucky, are hereby DISMISSED.

4. This case is hereby assigned for trial to be conducted in the manner set forth in Paragraph 2 hereof beginning at 9:30 a.m. on December 1, 1972. At least fifteen days prior to the trial of the action, the parties will exchange the names of all witnesses that any party proposes to introduce unless discovery proceedings instituted by any of the parties require the names of witnesses to be divulged prior thereto, and counsel shall meet and review all exhibits and documents which any party intends to introduce no later than November 15, 1972; and unless objection thereto is made within five days thereafter, all such exhibits or documents as are reviewed by counsel will be admitted in evidence subject to competency and relevancy. The parties are urged to meet no later than November 15, 1972, for the purpose of entering into a formal stipulation of all facts that can be stipulated by counsel; and a stipulation of such facts as may be agreed upon will be filed as soon thereafter as possible, bearing the signatures of all counsel.

(s) James F. Gordon
United States District Judge

Dated: _____

Copies to: John A. Fulton
E. Preston Young
J. Donald Dinning
Henry A. Triplett
Darrel T. Owens
Robert Allen Sedler
Thomas L. Hogan
William Friedlander
James T. Robertson
Charles J. Lunderman
John G. O'Mara
Galen Martin

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville

Civil Action No. 7291-G

JOHN E. HAYCRAFT AND HAZEL K. LANE, - - *Plaintiffs*

v.

BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, a body corporate, NEWMAN WALKER, Superintendent, Louisville Public Schools, BOARD of EDUCATION OF JEFFERSON COUNTY, KENTUCKY, a body corporate, and RICHARD VAN HOOSE, Superintendent, Jefferson County Public Schools, - - - - - - - *Defendants*

MEMORANDUM OPINION AND JUDGMENT—Entered March 8, 1973.

This action filed June 22, 1972, was tried to the Court on December 1-7, 1972. The Court has considered the voluminous testimony, the more than 130 exhibits, which were filed by agreement into the record, and upon the entire record herein now issues its Findings of Fact and Conclusions of Law and Judgment herein.

POSTURE OF THE LITIGATION

This is a school desegregation action[1] commenced by John E. Haycraft and Hazel K. Lane against the Board of Education of Louisville, Kentucky, the Board of Educa-

[1]Sponsored by the Kentucky Civil Liberties Union.

tion of Jefferson County, Kentucky, and their respective superintendents, seeking desegregation of the Louisville School District and demanding that the Court transfer so much of the Jefferson County School District as lies within the corporate limits of the City of Louisville into the Louisville School District.

By intervening complaint, Lyman Johnson, Richard Miller, Barbara Byrd, Aaron Howard, John R. Hughes, Teresa Black, John Schmidt and Earl Alluisi sue the Jefferson County Board of Education, the Board of Education of Louisville, the Anchorage, Kentucky Board of Education, and their respective superintendents, demanding complete desegregation of the three said school districts, and further that the Court order a merger of the three districts.[2]

A second intervening complaint was filed, sponsored by the American Federation of Teachers, a labor organization which claims it represents some of the teachers in all systems, demanding that the Court not arbitrarily assign teachers merely to achieve a balanced faculty.

Prior to the trial hereof, we entered certain threshold orders, to the effect that this Court lacked the judicial power to order a crossing of political boundaries as between the Jefferson County, Louisville and Anchorage School Districts, and, since the Anchorage School District (a very small school district located in the northeast portion of the county) was totally white, the Court, by final order with respect thereto, dismissed all proceedings against the Anchorage School District and its superintendent.

At the same time we directed separate trials, one immediately following the other, as to the status of each of the Louisville Independent School District and the Jefferson County School District.

Succinctness dictates an explanation at this point as to our reasoning behind the aforementioned threshold orders.

---

[2]Sponsored by the Human Relations Commission and the NAACP.

First off, at that point in time (October, 1972), the prevailing law on the crossing of political boundaries in integration cases was as expressed in *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058. The Supreme Court of the United States had declined to advance that matter upon its docket. The Sixth Circuit had not spoken on the issue.

Though it has always been our personal judicial feeling that a situation might possibly be *envisioned*, wherein established discrimination was *so invidious* and *dejure* and further wherein the district court might be so *"locked in"* by existing political boundaries that its desegregation problem became *insusceptible of any solution other than* by the crossing of political boundary lines that such might become legally acceptable; however, an examination by us of the pleadings in the instant matter and our knowledge of the historical local situation did not support the possibility of proof of such a set of facts here, and, accordingly, we followed the Fourth Circuit rule. We believe our judgment in this regard was vindicated, for on trial date, in his opening statement, renowned counsel for the plaintiffs stated:

> "We are *not* contending here that schools are racially identifiable because of poor quality or because of substandard education. In Swann, the court indicated that those factors would be taken into account. We are proceeding in the supposition that the quality of black schools is substantially the same as the quality of white schools and that the same kind of program is offered. The *only problem* is that the schools are racially identifiable." (Emphasis ours.)

Further, we hasten to point out to our judicial superiors that in spite of the threshold orders, we allowed the plaintiffs in the trial of their case full latitude to develop any and all such proof, as they desired, relative to those facts

which they thought justified the necessity of crossing political boundaries or pointed in that direction. Such is in the record. This precaution was taken by us that the Appellate Court would have before it, fully developed, *all* of the facts at issue; that no remand for basic factual finding would be required, in the event that Court, on appeal, found our threshold position to have been legally unsound.

Additionally, it should be noted that there was simultaneously pending on our docket, and is disposed of by another of our Opinions this very day, Civil Action No. 7045, styled Newburg Area Council v. Board of Education of Jefferson County, and Louisville Independent School District. We tried both the instant Civil Action and Action No. 7045, one immediately following the other; first, all plaintiffs against the Louisville District and then all plaintiffs against Jefferson County Board of Education. This seemed the orderly way to handle the matter.

Likewise, some explanation of our disposition of the intervening complaint against the Anchorage School Board is deserved. In that matter we felt the dismissal of Anchorage as a defendant was required, that our ruling as to crossing political boundaries be consistent, but we took such action fully cognizant of the fact that after development of the proof before us we had the power, if deemed necessary, to order Anchorage again made a party and thus brought back before us. The Anchorage Independent School District has a total student enrollment of only some 300 pupils. Defense of this litigation by it (and as it turns out under our holding herein wholly unnecessary) would have caused serious financial problems to that small school district.

The Sixth Circuit, on December 8, 1972, in the *Bradley, et al.* v. *Milliken, Governor, et al.*, 72-1809 and 72-1814, spoke as to the crossing of political boundaries. It withdrew that opinion on January 14, 1973, and granted rehearing en banc. Therefore, we believe, in view of the unsettled legal state of affairs as to the boundary problem, by the development